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The Minnesota Supreme Court: 1980

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Notes

The Minnesota Supreme Court: 1980

This Note critically reviews a select group of decisions rendered by the Minnesota Supreme Court in 1980. In one of the first decisions of its kind in any jurisdiction, the court granted relief under the Human Rights Act to a female who suffered sexual harassment by her coworkers. In the area of corporate law, the court held that equitable estoppel is a valid defense in an action under the Minnesota blue sky law for rescission of the sale of unregistered securities. In the area of criminal procedure, the court also expanded the scope of a limited "stop and frisk" weapons search to include the front seat of an automobile, approved the warrantless search of a probationer's apartment by a probation officer when the officer has reliable information that the probationer is using and selling drugs, and set forth criteria on the findings that trial courts must make in order to justify the revocation of probation. In the area of evidence, the court followed the lead of a number of other jurisdictions by holding that a person who had previously been hypnotized for purposes of memory refreshment could not testify at a criminal trial on the subject matter adduced at the hypnosis interview. In another pair of cases, the court held that it is no longer necessary to demonstrate intent to discriminate for a taxpayer to recover for discriminatory tax assessment, that the use of a special method of assessment that results in substantial undervaluation of certain properties in relation to the plaintiff's property constitutes discrimination, and that the measure of relief in such a case should be a reduction of the taxpayer's assessed value to the average percentage of market value at which other property in the same class is assessed. Finally, in the area of torts, the court clarified the standard for bystander recovery, abrogated the remaining areas of parental immunity, and held that common law malice is the appropriate standard both for fault and for punitive damages in a suit by an employee against his former employer.

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I. CIVIL RIGHTS

A. SEXUAL HARASSMENT BY COWORKERS

Willie Ruth Hawkins, a black female, worked for the Continental Can Company between December 1974 and October 1975. During that time, her coworkers repeatedly made sexually derogatory remarks and sexual advances to her. One male coworker frequently patted her on the posterior despite her objections. In March 1975, Hawkins complained to her supervisor at the factory about this treatment, but refused to identify the individuals responsible. No action was taken by Continental and Hawkins continued working under these conditions without further complaint until October 13, 1975, when a coworker approached her from behind and grabbed her between the legs. Hawkins registered an immediate complaint with the plant manager, but Continental took no action at that time. The grabbing incident led to a series of near-violent confrontations between Hawkins, her husband, and other workers. Fearing for her safety, Hawkins refused to return to work and filed a charge of sexual discrimination against Continental under the Minnesota Human Rights Act.¹ After these events Continental

1. MINN. STAT. § 363.01-14 (1980). The Minnesota Human Rights Act provides in relevant part: "Except when based on a bona fide occupational qualification, it is an unfair employment practice . . . (2) [f]or an employer, because of race, color, creed, religion, national origin, sex . . . (c) to discriminate against a person with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." MINN. STAT. § 363.03(1) (1980).

suspended two workers, launched an investigation, and promulgated a company policy against sexual harassment. A hearing examiner found that Continental had violated the law, but the district court reversed. On appeal, the Minnesota Supreme Court reversed for Hawkins, *holding* that the prohibition against sex discrimination in the Minnesota Human Rights Act includes sexual harassment of an employee by fellow employees when such harassment has a substantial impact on the conditions of employment and the employer knew or should have known of such conduct and failed to take timely and appropriate action.² *Continental Can Co. v. State*, 297 N.W.2d 241 (Minn. 1980).

Sexual harassment cases raise two main legal issues: the kind and degree of injury that the employee must suffer to demonstrate sex discrimination and whether liability will be imputed to the employer. Many Title VII³ sexual harassment cases have involved a male supervisor who demanded sexual favors from a female employee and then fired her when she refused. To prove sex discrimination in these situations, the employee must show that submission to the supervisor's sexual advances was a condition of continued employment,⁴ which could be established only after the employee had rejected the superior's advances and had been fired or denied a promotion.⁵ Because only supervisory personnel can cause such actual eco-

2. The court found that Continental had committed two unfair, discriminatory employment practices. The first occurred in March, when the supervisor was told of the harassment and the company failed to take any action. The second occurred on October 13, when the company failed to respond promptly after Hawkins complained of the grabbing incident. The court concluded that Hawkins had been constructively discharged and reinstated a back pay award set by the hearing examiner.

3. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976). The Civil Rights Act rendered it an unlawful employment practice for nongovernmental employers "to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's . . . sex" See Ginsburg & Koreski, *Sexual Advances by an Employee's Supervisor: A Sex Discrimination Violation of Title VII?*, 3 EMPLOYEE REL. L.J. 83 (1977); Siniscalco, *Sexual Harassment and Employer Liability: The Flirtation that Could Cost a Fortune*, 6 EMPLOYEE REL. L.J. 277 (1980); Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151, 153-67 (1979). For the most comprehensive authority in this area, see C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

4. See, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046 (3d Cir. 1977); *Garber v. Saxon Business Prods., Inc.*, 552 F.2d 1032, 1032 (4th Cir. 1977).

5. The sexual advances by the supervisor are not in themselves regarded as actionable. See, e.g., *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1390 (D. Colo. 1978) ("[T]ermination of plaintiff's employment when the advances were rejected is what makes the conduct legally objectionable.").

conomic loss, this injury standard has not protected the employee from harassment by other employees.⁶

An alternative standard is supported by commentators,⁷ a body of cases involving racial harassment,⁸ and, most recently, the Equal Employment Opportunity Commission interim guidelines on sexual harassment under Title VII.⁹ Under this standard, the employee need only demonstrate that the sexually harassing conduct affected the conditions of employment by creating a hostile work environment. This standard can be applied to cases of harassment by co-employees as well as by supervisors and does not require that the employee be terminated from employment to recover. Courts, however, have been reluctant to adopt this approach because of the difficulty of proving such a vague concept as "working atmosphere."¹⁰

As to the second issue, the imputation of liability to the employer, the courts have adopted a variety of approaches. A few of the oldest cases indicated that the employer would not be liable for sexual harassment of employees by supervisors unless such activity reflected a policy of the employer.¹¹ The

6. Another option available to the employee is to bring suit in tort against the offending superior or coemployee. The possible causes of action include assault, battery, intentional infliction of mental distress, and tortious interference with a contractual relationship. The principal problem with this approach is that courts are generally loathe to extend respondeat superior to hold the employer liable for the intentional torts of a supervisor. *See, e.g.*, *Barnes v. Costle*, 561 F.2d 983, 995, 997 (D.C. Cir. 1977) (MacKinnon, J., concurring). *See generally* Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U.L. REV. 879 (1980); Note, *supra* note 3, at 167-76.

7. *E.g.*, Note, *Sexual Harassment and Title VII: Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007, 1035 (1978).

8. In these cases the plaintiff alleged racial harassment in the workplace in violation of Title VII. *See, e.g.*, *DeGrace v. Rumsfeld*, 614 F.2d 796, 800 (1st Cir. 1980) (black employee subjected to threatening notes and "silent treatment" from coworkers); *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977) (occasional ethnic slurs by supervisor); *E.E.O.C. v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 384-85 (D. Minn. 1980) (black employee subjected to vicious and frequent instances of racial harassment by coworkers).

9. In April, 1980, the E.E.O.C. promulgated guidelines for sexual harassment cases brought under Title VII. *See* 29 C.F.R. § 1604.11 (1980).

10. *See, e.g.*, *Dickerson v. United States Steel Corp.*, 439 F. Supp. 55, 74 (E.D. Pa. 1977) ("Such a nebulous concept—that of atmosphere—is not susceptible to any accepted methods of proof in a court of law."). For a decision rendered after *Continental Can* that has adopted the "working conditions" approach to sexual harassment cases, see *Bundy v. Jackson*, No. 79-1693 (D.C. Cir. Jan. 12, 1981).

11. *See, e.g.*, *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975). *Cf. Ludington v. Sambo's Restaurant, Inc.*, 474 F. Supp. 480, 483 (E.D. Wis. 1979) (individual acts of sexual harassment by supervisors not actionable

majority position, however, is less stringent. Under this standard, the employer is liable for discriminatory sexual harassment of which it had actual or constructive notice and failed to take appropriate measures.¹² Two recent cases go even further, dictating that an employer is vicariously liable for sexual harassment perpetrated by supervisors or agents, regardless of the extent of the employer's knowledge.¹³ The new E.E.O.C. guidelines adopt a similar position, automatically rendering the employer vicariously liable for the conduct of agents and supervisors, and holding the employer liable for the conduct of other employees to the extent that the employer is found to have had actual or constructive knowledge of the conduct and failed to act.¹⁴

In *Continental Can*, the Minnesota Supreme Court distinguished the Title VII sexual harassment cases¹⁵ involving retaliation by a supervisor and instead relied on the more closely analogous cases involving racial harassment of a minority employee by other employees.¹⁶ The court also referred to the E.E.O.C. interim guidelines, which characterize "[u]nwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature" as sexual harassment when "such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."¹⁷ The court noted that at some point sexual harassment such as the kind suffered by Hawkins becomes sufficiently pervasive and objectionable as to create a working environment different for women than it is for men. When the conduct "impact[s] on the conditions of employment," there is discrimination on the basis of sex.¹⁸ The court concluded that the verbal and physi-

unless actively or tacitly sanctioned by the employer or unless such acts constitute an official policy of the employer). The *Corne* decision is criticized in Comment, *Employment Discrimination—Sexual Harassment and Title VII*, 51 N.Y.U.L. REV. 148 (1976).

12. See, e.g., cases cited in note 4 *supra*.

13. See *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979); *Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977).

14. See 29 C.F.R. § 1604.11 (1980).

15. It is well established that the court may look to principles established in Title VII actions when deciding a case under the Minnesota Human Rights Act. See *Danz v. Jones*, 263 N.W.2d 395, 398-99 (Minn. 1978).

16. See note 8 *supra*.

17. 29 C.F.R. § 1604.11 (1980).

18. *Continental Can Co. v. State*, 297 N.W.2d at 248. The court intimated that this new focus on working conditions was not very different from the traditional cases dealing with sexual favors demanded as a condition of continued employment. In effect, where sexual harassment is regularly part of the job ex-

cal abuse Hawkins suffered amounted to sexual discrimination. The employer would be liable for such discrimination, the court continued, when it had actual or constructive knowledge of the conduct and failed to take prompt and appropriate action.¹⁹ The employer would be deemed to have constructive knowledge when a supervisor or a manager became aware of the conditions.²⁰ When the employer has knowledge of harassment, but the identity of the harassers is unknown, the employer should issue a policy statement opposing sexual harassment.²¹ When the identity of the offenders is known, the company should investigate immediately and warn the individuals against recurrences, or, in the extreme cases, suspend them.²² It is clear from the court's opinion that prompt effort must be made to prevent further instances of harassment.²³ The court noted that Continental's response to the harassment of Hawkins would have been adequate if the company had acted more rapidly.²⁴

As a case of first impression under the Minnesota Human Rights Act and one of the first decisions in any jurisdiction allowing recovery against an employer for harassment committed by other employees,²⁵ the *Continental Can* decision represents a major development both in Minnesota law and in the law of sex discrimination. It affirms the right of employees to relief from psychologically harmful sexual harassment. It also provides that the employee need no longer wait to be fired before taking legal action. Although some employers will find the burden that the court has placed upon them objectionable, the burden is not an onerous one. The actual or constructive notice standard has already proven itself fair and workable,²⁶ and the requirement that the employer take appropriate action is flex-

perience, then continued employment is contingent on enduring that harassment. See *id.*

19. *Id.* at 249.

20. See *id.* at 246, 250. Although the court specifically avoided the issue of employer liability for harassing conduct perpetrated by a supervisor, *id.* at 249 n.5, the standard of constructive notice to the employer when a supervisor has knowledge would seem to point to automatic vicarious liability of the employer when the supervisor is the harasser. This result would be consistent with the new E.E.O.C. guidelines. See text accompanying note 14 *supra*.

21. See 297 N.W.2d at 250.

22. *Id.*

23. *Id.*

24. *Id.* at 250-51.

25. Cf. *Kyriazi v. Western Elec. Co.*, 476 F. Supp. 335, 340 (D.N.J. 1979) (involving harassment and other forms of sex discrimination).

26. See, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048-49 (3d Cir. 1977).

ible, taking into consideration such factors as the resources available to the firm to undertake immediate investigations of alleged harassment. Moreover, the court specifically rejected as overly severe the proposal that an employer has a duty to maintain a working environment free from sexual harassment; the employer only has a duty to act when it knows or should know of harassment.²⁷ The major problem created by the court's holding is that of defining when the environment of a workplace has become so adversely affected by sexual harassment as to create a cause of action for discrimination. Presented in *Continental Can* with a case involving physical as well as verbal harassment, the Minnesota Supreme Court provided little guidance for trial courts on where to draw the line in more difficult cases.²⁸

II. CORPORATIONS

A. EQUITABLE ESTOPPEL AS A DEFENSE TO RECISSION OF STOCK SALE

Panuska and Howard were the sole shareholders in a corporation that owned and operated a restaurant. In 1969, Howard agreed to sell his interest and Panuska made arrangements for thirteen other investors to purchase Howard's shares. The investors, some of whom were regular patrons of the restaurant, were not fraudulently induced to purchase the shares. After purchasing the stock, some of the investors participated extensively in the management of the business.¹ The business continued for about three years before failing. The investors brought two separate actions against Panuska to rescind the

27. *Continental Can Co. v. State*, 297 N.W.2d at 249.

28. The court noted that instances of alleged discrimination would have to be judged on a case-by-case basis. *Id.* Future courts may find it useful to refer to the body of case law on racial harassment, in which an "excessive and opprobrious" standard has been invoked in several cases. *See, e.g., Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977); *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). Some cases also specify that the conduct be "a concerted pattern of harassment" and not merely isolated, casual instances of verbal insults. *See E.E.O.C. v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 385 (D. Minn. 1980); *Fekete v. United States Steel Corp.*, 353 F. Supp. 1177, 1186 (W.D. Pa. 1973).

1. Logan, for example, became a director and first vice president of the corporation. He was involved in the day-to-day control of the kitchen operations, and for a time was authorized to write checks on the corporation's behalf and assist in making personnel decisions. *Logan v. Panuska*, 293 N.W.2d 359, 361 (Minn. 1980). *But see id.* at 365 (J. Scott, dissenting) (investors' input to management merely advisory and undertaken out of a desire to safeguard their investments).

original sale of stock and recover the purchase price on grounds that the shares had not been registered under the state blue sky laws.² Defendant Panuska invoked the affirmative defense of equitable estoppel,³ claiming that plaintiffs' participation in the management of the business estopped them from rescinding the sale. The defense was allowed in one action and disallowed in the other.⁴ On appeal, the Minnesota Supreme Court consolidated the actions, *holding* that estoppel is a valid defense in an action for rescission under the Minnesota blue sky laws and may be invoked by the seller when the purchaser was not fraudulently induced to invest and the purchaser actively participated in the management and control of the corporation during the course of the investment. *Logan v. Panuska*, 293 N.W.2d 359 (Minn. 1980).

The remedy of rescission in the context of blue sky laws serves a dual function. It compensates the injured purchaser of securities, and, by depriving the seller of any wrongful gain, it compels sellers to comply with the law by registering the securities to be offered with the state.⁵ The first function is essentially equitable; the second is penal. The inherent tension between these two aspects of blue sky rescission has been re-

2. 1955 MINN. LAWS ch. 19, § 2 provided: "No securities except those exempt under section 80.05 and those sold in sales exempt under section 80.06, shall be offered for sale or sold within the state unless such securities have been registered pursuant to sections 80.08 or 80.09 . . ." This act was repealed in 1973. 1973 MINN. LAWS ch. 941, § 1. The current law is substantially the same as to the registration requirement, providing: "It is unlawful for any person to offer or sell any security in this state unless (a) it is registered under sections 80A.01 to 80A.31 or (b) the security or transaction is exempted under section 80A.15." MINN. STAT. § 80A.08 (1980). The *Logan* case was tried and reviewed on appeal under the older statute, which provided for civil liability of the seller who violated any of the various registration requirements. The current version is found at MINN. STAT. § 80A.23 (1980).

The academic literature on blue sky laws is substantial. See, e.g., L. LOSS & E. COWETT, *BLUE SKY LAW* (1958); Perlman, *A Critical Analysis of the Registration Provisions of the Minnesota Securities Act*, 56 MINN. L. REV. 523 (1972).

3. From the facts appearing in the opinion, the defense appeared closer to one of ratification than estoppel. Equitable estoppel typically requires detrimental reliance by the party asserting the defense. Ratification, however, is merely confirmation implied through conduct, and does not require that the other party be prejudiced. See 3 J. POMEROY, *EQUITY JURISPRUDENCE* §§ 805, 916 (5th ed. 1941).

4. See *Logan v. Panuska*, 293 N.W.2d at 362.

5. There are two purposes behind the registration requirement: to insure that information regarding the company and its securities is available for the potential investor to inspect, and to give the state administrator an opportunity to inspect the offering in order to determine the degree of risk involved. The utility of the second purpose has been questioned, and there has been considerable sentiment for curbing or discarding this type of regulation. See, e.g., J. MOFSKY, *BLUE SKY RESTRICTIONS ON NEW BUSINESS PROMOTIONS* 15-17 (1971).

solved differently in various jurisdictions. Courts in the majority of states still emphasize the penal or deterrent function,⁶ construing their blue sky laws to preclude a seller from using the equitable defenses of estoppel and ratification. In a substantial minority of states,⁷ however, courts consider the equities at stake and occasionally allow such defenses. These courts take into account such factors as the absence of fraudulent inducement,⁸ the purchaser's participation in the management of the firm,⁹ the acceptance of dividends and other benefits,¹⁰ any undue delay in bringing suit,¹¹ and the extent of the purchaser's knowledge of the illegality of the transaction and of investments in general.¹²

The Minnesota blue sky statute does not specify whether the defense of estoppel should be allowed in a purchaser's action for rescission.¹³ In previous cases, courts have recognized

6. See, e.g., *Gowdy v. Richter*, 20 Ill. App. 3d 514, 525, 314 N.E.2d 549, 557 (1974); *Covert v. Cross*, 331 S.W.2d 576, 585 (Mo. 1960). See also *United Bank & Trust Co. v. Joyner*, 40 Ariz. 229, 11 P.2d 829 (1932); *Regan v. Albin*, 219 Cal. 357, 26 P.2d 475 (1933); *Kneeland v. Emerton*, 280 Mass. 371, 183 N.E. 155 (1932). See generally Note, *Denying Purchasers the Assertion of Illegality under Blue Sky Laws*, 42 VA. L. REV. 205 (1956).

7. See, e.g., *Schultz v. Rector-Phillips-Morse, Inc.*, 261 Ark. 769, 788, 552 S.W.2d 4, 14 (1977) (defenses of laches and estoppel allowed in absence of allegation of fraud); *Popper v. Havana Publications, Inc.*, 122 So. 2d 247, 248 (Fla. Dist. Ct. App. 1960) (estoppel is permissible where sale is voidable); *Goldblum v. Boyd*, 341 So. 2d 436, 447-48 (La. Ct. App. 1976) (plaintiff estopped by actively participating in management); *Tucker v. McDells, Inc.*, 50 Tenn. App. 62, 71, 359 S.W.2d 597, 600 (1962) (investor taking active part in management estopped from rescinding); *Ladd v. Knowles*, 505 S.W.2d 662, 672 (Tex. Civ. App. 1974) (purchaser found *in pari delicto* knowing that stock was not registered at time of purchase).

8. E.g., *Schultz v. Rector-Phillips-Morse, Inc.*, 261 Ark. 769, 778, 552 S.W.2d 4, 14 (1977).

9. E.g., *Tucker v. McDells, Inc.*, 50 Tenn. App. 62, 71, 359 S.W.2d 597, 600 (1962). Cf. *Loewenstein v. Midwestern Investment Co.*, 181 Neb. 547, 553-54, 149 N.W.2d 512, 516 (1967) (no estoppel when plaintiff was subsequently elected to the issuing corporation's board of directors and attended two meetings, but did not participate in management).

10. E.g., *Tawney v. Blankenship*, 150 Kan. 41, 46, 90 P.2d 1111, 1114 (1939).

11. E.g., *id.*

12. E.g., *Ladd v. Knowles*, 505 S.W.2d 662, 672 (Tex. Civ. App. 1974).

13. The old statute provided virtually no guidance to courts presiding over civil actions. See 1941 MINN. LAWS ch. 547, § 18. The new statute is more explicit in some respects, but does not deal with the problem of ratification and estoppel. It does, however, specify that suits must be brought "in equity," possibly implying an acknowledgment of the traditional equitable defenses. MINN. STAT. § 80A.23(1) (1980). On the other hand, another clause prohibits the express waiver of any provision of the state blue sky laws by the purchaser. MINN. STAT. § 80A.23(10) (1980). This clause could be interpreted as excluding implied waiver, or ratification, as well. See generally L. LOSS & E. COWERT, *supra* note 2, at 174-75. Finally, MINN. STAT. § 80A.23(9) (1980), which codifies in part the defense of *in pari delicto*, might be interpreted as intended to negate

only the defenses of the statute of limitations¹⁴ and *in pari delicto* in applying Minnesota law.¹⁵ Reasoning that sales of securities in violation of blue sky requirements are "void" rather than "voidable,"¹⁶ courts have concluded that the defense of ratification is not available.¹⁷

In *Logan*, the Minnesota Supreme Court began by rejecting the characterization of the sale as either void or voidable.¹⁸ It noted that there was no indication of legislative intent to make all sales contrary to the statute void,¹⁹ and that on prior occasions the court had simply overlooked the voidness problem when equity so demanded.²⁰ The court went on to approve the defense of equitable estoppel for two reasons. First, the court argued that it would be inequitable to allow the plaintiffs to place the entire loss upon the defendant when both were actively involved in operating the business and the plaintiffs had not been induced to buy into the corporation.²¹ Second, the court characterized the plaintiffs' suits as attempts to use the blue sky law to correct their own errors of business judgment.²² The court considered such managerial business errors too remote from the major purpose of the law, which is to

any other defenses. The legislative history of the 1973 act, however, is devoid of any consideration of the ratification or estoppel defenses. See Journal of the House, 514, 2012, 2040, 2451, 2595 (1973); Journal of the Senate, 354, 410, 451, 1240, 1621, 2014, 2881, 2854, 3740 (1973).

14. See *City of New York, Inc. v. Stern*, 110 F.2d 601, 603 (8th Cir. 1940) (applying Minnesota law), *rev'd on other grounds*, 312 U.S. 666 (1941).

15. See *McCauley v. Michael*, 256 N.W.2d 491, 496 (Minn. 1977). The court extended this defense beyond its usual bounds to include instances in which the purchaser was merely aware of the illegality of the transaction. The court was careful to note, however, that this was a suit brought by the purchaser to specifically enforce the contract of sale, not to rescind it. In *Webster v. U.S.I. Realty Co.*, 170 Minn. 360, 361, 212 N.W. 806, 807 (1927), the court held that a purchaser was not *in pari delicto* with the seller by the mere fact of having purchased unregistered securities.

16. See *Stern v. National City Co.*, 25 F. Supp. 948, 957 (D. Minn. 1938) (applying Minnesota law); *Drees v. Minnesota Petroleum Co.*, 189 Minn. 608, 610, 250 N.W. 563, 565 (1933); *Vercellini v. U.S.I. Realty Co.*, 158 Minn. 72, 72, 196 N.W. 672, 672 (1924).

17. Voidable contracts may be ratified, whereas void ones may not. 1A A. CORBIN, CORBIN ON CONTRACTS §§ 227, 228 (1962).

18. *Logan v. Panuska*, 293 N.W.2d at 363.

19. *Id.*

20. In *Marin v. Olson*, 181 Minn. 327, 328, 232 N.W. 523, 523 (1930), and *Parker v. Merritt*, 164 Minn. 305, 306, 204 N.W. 941, 942 (1925), the court construed the sale as "voidable" in order to estop the purchaser from denying ownership of the stock as against an innocent third party creditor. This is a classic illustration of estoppel, since there was detrimental reliance by the third party. See note 3 *supra*.

21. *Logan v. Panuska*, 293 N.W.2d at 364.

22. *Id.* at 363.

protect investors from injury incurred through the sale of unregistered securities.²³

The court proceeded wisely in discarding the void-voidable dichotomy as a basis for decision. This approach is riddled with exceptions and is no longer followed in most jurisdictions.²⁴ Given language that limits its holding to cases not involving fraudulent inducement,²⁵ a reasonable balance is struck between equity and deterrence. The only major drawback is that this new rule may be more difficult to administer than a simple bar to the defense. For example, the court's implied distinction between investment activity and business activity²⁶ may prove troublesome in deciding when to allow the defense, especially in a case where the investors participate in managing the firm in a minimal way only to safeguard their investments. Maintaining the distinction is important, however, to ensure that blue sky protection does not exceed its intended boundaries.

III. CRIMINAL PROCEDURE

A. LIMITED WEAPONS SEARCH

Four St. Paul, Minnesota police officers were observing a suspected after-hours liquor establishment. One of the officers noticed a car parked in an adjacent lot that was similar to the vehicle described in a notice posted at police headquarters. The notice stated that the driver of the car, Earl Gilchrist, was suspected of involvement in a homicide in Nebraska and was probably armed. The notice also included a picture of Gilchrist, but did not state whether warrants had been issued for his arrest.¹ In addition to the information provided by the notice, the officers knew of an incident at an after-hours establishment the year before in which Gilchrist allegedly shot a gun at another person. When the officers approached the vehicle one of them recognized Gilchrist sitting in the front seat; Gilchrist was asked to get out of the car and to produce identification. Although the exact order of the subsequent events is not clear,

23. Justice Scott entered a forceful dissent, arguing that the majority's approach was inconsistent with the express terms of the statute and would tend to undermine the statute's deterrent effect. *Id.* at 364 (Scott, J., dissenting).

24. See L. LOSS & E. COWETT, *supra* note 2, at 131.

25. *Logan v. Panuska*, 293 N.W.2d at 363.

26. See text accompanying notes 21-23 *supra*.

1. No copy of the notice could be found for production at trial. *State v. Gilchrist*, 299 N.W.2d 913, 914 (Minn. 1980).

one of the officers patted down Gilchrist while two others searched the car for weapons. The officers found a cut soda straw of the type used to ingest cocaine in Gilchrist's pocket and a gun under the front seat. After finding the gun the officers arrested Gilchrist and took him to the police station where he was searched and an envelope filled with cocaine was found in his pocket. Although Gilchrist challenged the admission of the straw, the gun, and the cocaine, the trial court convicted him of possession of a pistol without a permit and possession of cocaine. The Minnesota Supreme Court affirmed, *holding* that the police properly subjected the defendant to a forcible stop and limited weapons search and that the area beneath the front seat of the defendant's automobile was within the proper scope of the limited weapons search. *State v. Gilchrist*, 299 N.W.2d 913 (Minn. 1980).

The United States Supreme Court held in *Terry v. Ohio*,² that a police officer who has reason to believe that he or she is dealing with an armed and dangerous person may conduct a "carefully limited search" of the person's outer clothing for weapons that may be used to attack the officer, even if the officer does not have probable cause for an arrest.³ Because such a search is reasonable under the fourth amendment,⁴ any weapons seized in the course of the search may be introduced into evidence.⁵ The primary rationale for allowing the search is the officer's self-protection.⁶ Although the Supreme Court has not determined whether the permissible scope of a *Terry* search includes the interior of a suspect's car if the suspect is in the vehicle when stopped, several United States Circuit Courts of Appeals have held that in conducting an otherwise proper stop and frisk, the police may search a person's automobile.⁷ These courts state that such searches are justified to protect the officers, reasoning that the suspect may have a weapon concealed in the vehicle as well as on his or her person.⁸ The Fifth Circuit has suggested, however, that once a person has

2. 392 U.S. 1 (1968).

3. *Id.* at 30. See also *Sibron v. New York*, 392 U.S. 40, 66-67 (1968).

4. *Terry v. Ohio*, 392 U.S. at 25, 27.

5. *Id.* at 31.

6. See *id.* at 30.

7. *United States v. Wilkerson*, 598 F.2d 621, 624-25 (D.C. Cir. 1978); *United States v. Rainone*, 586 F.2d 1132, 1136 (7th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979); *United States v. Green*, 465 F.2d 620, 624-25 (D.C. Cir. 1972). See also *United States v. Santana*, 485 F.2d 365, 368 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974) (dictum).

8. See, e.g., *United States v. Wilkerson*, 598 F.2d 621, 625 (D.C. Cir. 1978).

left the vehicle, he or she no longer has access to any weapon that might be concealed there, and thus a weapon hidden in the car does not present a danger to the investigating officer.⁹ Moreover, as the Massachusetts Supreme Court has observed, the suspect "could hardly be viewed as a potential assailant after he had returned to his vehicle and knew that he had not been detained by the police."¹⁰ In Minnesota, the extension of the scope of a *Terry* search to the interior of a suspect's car had never been addressed prior to *Gilchrist*.¹¹

In concluding that the area underneath the front seat of Gilchrist's automobile was within the scope of a limited weapons search, the Minnesota Supreme Court reasoned that a weapon concealed in the car would continue to pose a danger to police even after the suspect's release. As the court observed, Gilchrist might have reentered his car, "pull[ed] out a gun, and start[ed] shooting."¹² Because Gilchrist was known to carry firearms and had a reputation for violence, the officers were justified in searching his car for readily accessible weapons.¹³ Nevertheless, the court recognized that the car search was a "close case" under *Terry* and expressly limited the *Gilchrist* holding to the "special situation" in which the suspect's past record justifies the officer's reasonable belief that the suspect may be armed.¹⁴

Justice Wahl, in a dissent joined by Justice Rogosheske, took exception to the court's conclusion that the scope of a *Terry* frisk included the interior of defendant's car.¹⁵ Justice Wahl emphasized that under *Terry*, "a frisk is constitutionally limited to a pat-down search of the outer clothing of the suspect to discover weapons which might be used to assault the officer."¹⁶ Moreover, Justice Wahl noted, that the "general non-hostile atmosphere" of the encounter between Gilchrist and the police indicated that "the search was not reasonably justi-

9. See *Government of Canal Zone v. Bender*, 573 F.2d 1329, 1332 (5th Cir. 1978).

10. *Commonwealth v. Silva*, 366 Mass. 402, 409, 318 N.E.2d 895, 900 (1974).

11. The Minnesota Supreme Court has previously dealt with other aspects of a search under *Terry v. Ohio*, 392 U.S. 1 (1968). See, e.g., *State v. Bitterman*, 304 Minn. 481, 484-85, 232 N.W.2d 91, 93-94 (1975); *State v. O'Neill*, 299 Minn. 60, 65-70, 216 N.W.2d 822, 826-29 (1974) (dictum); *State v. Gannaway*, 291 Minn. 391, 392-93, 191 N.W.2d 555, 556-57 (1971).

12. *State v. Gilchrist*, 299 N.W. 2d at 917.

13. See *id.* at 918.

14. *Id.* at 917-18.

15. *Id.* at 918 (Wahl, J., dissenting).

16. *Id.* (Wahl, J., dissenting).

fied by a concern for the officers' immediate safety."¹⁷

On balance, the concerns raised by the dissent are valid. It seems unlikely that a suspect, in the normal course of events, would attack police officers after he or she had been stopped, questioned, and released. If police officers feared that this might occur, they could place the suspect in the back of their squad car during questioning. The suspect would then have to walk back to his or her vehicle after questioning, thus affording the suspect little opportunity to retrieve a weapon and harm the officers. As the *Terry* court observed, a search and seizure is not justified unless "reasonably related in scope to the circumstances which justified the interference in the first place,"¹⁸ and under *Terry* the primary justification for the search is protection of the officer. Moreover, the "special situation" test announced in *Gilchrist* is potentially subject to abuse, and may in fact encourage otherwise prohibited searches on the pretext that the officers had unsubstantiated, private information that the suspect had a reputation for armed violence. Thus, the court erred in expanding the Supreme Court's limited exception to the probable cause requirement in *Terry*—unfortunately, such an expansion may well be exploited as a means to erode fourth amendment rights.¹⁹

B. WARRANTLESS SEARCH BY PROBATION OFFICER

Glenn Arnold Earnest's probation officer received reliable information that Earnest was using and selling drugs, and searched Earnest's apartment. Although the probation officer had probable cause for the search,¹ he did not obtain a warrant. The officer discovered and seized amphetamine capsules, which were later admitted into evidence during Earnest's probation revocation hearing. The trial court revoked probation on grounds that Earnest violated the terms of his probation by illegally possessing controlled substances.² The Minnesota

17. *Id.* (Wahl, J., dissenting).

18. 392 U.S. at 20. See also Comment, 13 SUFFOLK U.L. REV. 1101, 1117 (1979).

19. See *Adams v. Williams*, 407 U.S. 143, 153 (1972) (Brennan, J., dissenting).

1. *State v. Earnest*, 293 N.W.2d 365, 367 n.1 (Minn. 1980).

2. *Id.* at 368. The trial court also found that Earnest violated the terms of his probation by terminating his employment without permission and by assaulting his parents. These violations were insufficient to require revocation, however, absent the finding that Earnest illegally possessed a controlled substance. *Id.*

Supreme Court affirmed, *holding* that a warrantless probable cause search of a probationer's residence by a probation officer is reasonable for purposes of the fourth amendment when the search is based on reliable information that the probationer is using and selling drugs. *State v. Earnest*, 293 N.W.2d 365 (Minn. 1980).

The fourth amendment secures "[t]he right of the people . . . against unreasonable searches and seizures" by requiring investigating officers to obtain a warrant, predicated on a showing of probable cause, before conducting a search.³ Although it has recognized certain exceptions to the warrant requirement,⁴ the United States Supreme Court has expressed a "strong preference" for searches and seizures conducted pursuant to a search warrant.⁵

The Court has not indicated whether searches by probation officers are governed by the fourth amendment's warrant requirement, but several other courts have held that a probation or parole officer may conduct a reasonable search of a probationer or parolee⁶ without obtaining a warrant.⁷ Arguing that a parolee has a lesser expectation of privacy than an ordinary citizen,⁸ and that the state has a special interest in supervising a parolee,⁹ the United States Court of Appeals for the Ninth Circuit in *Latta v. Fitzharris*¹⁰ concluded that a warrantless search by a parole officer is reasonable and does not violate the fourth amendment when the parole officer "reasonably believes that [a] search is necessary."¹¹ In order to buttress this conclusion,

3. U.S. CONST. amend. IV.

4. See 2 W. LAFAYE, SEARCH AND SEIZURE § 4.1(a), at 3-5 (1978). Among the exceptions to the warrant requirement noted by Professor LaFave are searches incident to a lawful arrest, searches under exigent circumstances, and searches conducted pursuant to the suspect's consent. *Id.*

5. *Id.* at 3.

6. The fourth amendment rights of probationers and parolees are generally viewed as equivalent. See 3 W. LAFAYE, *supra* note 4, § 10.10, at 422.

7. See, e.g., *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir.) (plurality opinion), *cert. denied*, 423 U.S. 897 (1975); *United States ex rel. Radazzo v. Follette*, 282 F. Supp. 10, 15 (S.D.N.Y. 1968), *aff'd*, 418 F.2d 1319, 1322 (2d Cir. 1969), *cert. denied*, 402 U.S. 984 (1971); *People v. Hernandez*, 229 Cal. App. 2d 143, 150-51, 40 Cal. Rptr. 100, 104 (1964), *cert. denied*, 381 U.S. 953 (1965); *People v. Santos*, 31 A.D.2d 508, 509, 298 N.Y.S.2d 526, 528, *aff'd*, 25 N.Y.2d 976, 252 N.E.2d 861, 305 N.Y.S.2d 365 (1969).

8. *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir.) (plurality opinion), *cert. denied*, 423 U.S. 897 (1975).

9. *Id.* at 249.

10. 521 F.2d 246 (9th Cir.) (plurality opinion), *cert. denied*, 423 U.S. 897 (1975).

11. *Id.* at 250. The court stated that the officer's decision "may be based upon specific facts, though they be less than sufficient to sustain a finding of

the court compared warrantless searches by parole officers to warrantless administrative searches,¹² which are allowed if the warrant requirement would frustrate the purposes of the search.¹³ Applying this reasoning to the parole context, the *Latta* court argued that a warrant requirement would impair the ability of parole officers to supervise parolees.¹⁴

The Ninth Circuit's conclusion that parole officers may conduct warrantless searches of parolees has been criticized by some courts¹⁵ and commentators.¹⁶ In a recent pair of decisions, the Fourth Circuit held that, absent exigent circumstances, parole and probation officers cannot conduct warrantless searches of parolees and probationers,¹⁷ and that evidence seized in such searches should be excluded from criminal proceedings, parole hearings, and probation revocation hearings.¹⁸ The Fourth Circuit reasoned in *United States v. Workman*,¹⁹ that a probation revocation hearing is adjudicative and may result in the probationer's loss of liberty. Because a probation revocation hearing is equivalent to a criminal prosecution in these respects, the court concluded that a probationer is entitled to invoke the same exclusionary rule that is available to criminal defendants.²⁰

In holding that a probation officer's warrantless probable cause search of a probationer was reasonable for purposes of the fourth amendment, the Minnesota Supreme Court relied without reservation on the *Latta* decision. In reaching the conclusion that the special demands of the probation relationship²¹

probable cause." *Id.* Although the court's opinion stated that a parole officer's "hunch" was sufficient grounds to conduct a warrantless search, two concurring judges did not accept the sufficiency of a hunch. *See id.* at 253-54 (Choy and Merrill, J.J., concurring).

12. *Id.* at 251.

13. *See* *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967).

14. The *Latta* court cited *United States v. Biswell*, 406 U.S. 311 (1972) (warrantless search under Gun Control Act held valid), and *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (warrantless search under liquor licensee statute), as authority for the extension of the administrative search exception to parole officers. *See* 521 F.2d at 251.

15. *See* *United States v. Workman*, 585 F.2d 1205, 1208 (4th Cir. 1978); *United States v. Bradley*, 571 F.2d 787, 789 (4th Cir. 1978). *See also* *Latta v. Fitzharris*, 521 F.2d at 254-59 (Hufstедler, J., dissenting).

16. *See, e.g.*, Recent Decisions, 47 GEO. WASH. L. REV. 863 (1979).

17. *United States v. Bradley*, 571 F.2d 787, 789 (4th Cir. 1978). The *Bradley* court relied on Judge Hufstедler's dissent in *Latta v. Fitzharris*, 521 F.2d at 254-59 (Hufstедler, J., dissenting). 571 F.2d at 789.

18. *United States v. Workman*, 585 F.2d 1205, 1211 (4th Cir. 1978).

19. 585 F.2d 1205 (4th Cir. 1978).

20. *Id.* at 1209-10.

21. These special demands include "the pervasiveness of the regulation to

justify warrantless searches, the court endorsed *Latta*'s analogy to administrative searches.²² Although acknowledging that *Workman* provided authority for a contrary result, the court stated, without elaboration, that "under the facts and circumstances of this case, *Latta* . . . is . . . more persuasive."²³ Finally, because it concluded that the search did not violate the fourth amendment, the court declined to rule on the applicability of the exclusionary rule to probation revocation proceedings.²⁴

The Minnesota Supreme Court's reliance on *Latta* is misplaced. First, the Ninth Circuit's assertion that the fourth amendment requires only that a search be reasonable is incorrect. Rather, the fourth amendment has consistently been construed to require a warrant, unless a warrant requirement would be unreasonable.²⁵ Second, the *Latta* court inaccurately asserted that a warrantless search by a parole officer is analogous to a warrantless administrative search. In fact, the two situations are readily distinguishable. Cases upholding warrantless administrative searches involve statutes that expressly waive the warrant requirement and set forth detailed regulations governing the scope of the search.²⁶ In the probation context there is no statutory waiver and there are no regulations

which the probationer is subject, [and] the lowered expectation of privacy of the probationer." 293 N.W.2d at 369. The court also argued that unless probation officers are granted the means to effectively supervise probationers, courts will be reluctant to grant probation, thus undermining the viability of the probation system as an alternative to incarceration. *Id.*

22. *Id.* at 368 & n.3.

23. *Id.* at 369 n.4. Although the *Earnest* court implied that the case at bar was distinguished from *Workman*, upon analysis *Latta*, *Workman*, and *Earnest* are similar in all material respects. All three involved warrantless searches by corrections officers under circumstances in which the officer could have obtained a warrant prior to the search. The probation officers in both *Workman* and *Earnest* had received information that their probationers were dealing in illegal liquor and drugs, respectively. It is likely that a warrant to search for the contraband would issue under these circumstances. In *Latta*, the defendant was already in custody when his parole officer conducted the search. Having discovered *Latta* smoking marijuana, the parole officer could reasonably expect to obtain a warrant to search for more marijuana at the defendant's home. Finally, because *Latta* was in custody, and *Earnest* and *Workman* were presumably unaware of their probation officers' suspicions, it is unlikely that important evidence would have been lost in any of the three cases during the few hours delay necessary to procure the warrant.

24. 293 N.W.2d at 369.

25. *Latta v. Fitzharris*, 521 F.2d at 254-55 (Hufstедler, J., dissenting) (citing, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *United States v. United States District Court*, 407 U.S. 297, 315 (1972)).

26. See *United States v. Biswell*, 406 U.S. 311, 311-12 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 73-74 (1970).

governing warrantless searches by probation officers.²⁷ Under the United States Supreme Court's balancing test for warrantless administrative searches, the state must show that the "burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."²⁸ A warrant requirement, however, would not impair the ability of a probation officer to supervise a probationer.²⁹ Furthermore, the consequence of following *Latta* and finding the search in *Earnest* reasonable under the fourth amendment is that the evidence seized by the probation officer would often be admissible in a criminal prosecution.³⁰ Probation officers are thus allowed to gather evidence for purposes of criminal prosecution in a manner that the police themselves could not pursue, and there is the possibility that police will enlist probation officers to conduct warrantless searches.

Concerned about the use of evidence seized by probation officers in criminal prosecutions, Justice Rogosheske stated in a special concurrence to *Earnest* that probation officers' warrantless searches should be held in violation of the fourth amendment, but argued against the extension of the exclusionary rule to probation revocation hearings.³¹ The effect of Justice Rogosheske's approach would be to preclude the use of evidence in criminal prosecutions where the exclusionary rule is well established,³² but to allow such evidence in probation revocation hearings. It seems odd, however, to instruct probation officers that they may violate a probationer's fourth amendment rights with impunity,³³ so long as the fruits of the search

27. *Latta v. Fitzharris*, 521 F.2d at 255-56 (Hufstедler, J., dissenting).

28. *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967).

29. Probation officers could make home visits without a warrant; on the basis of observations made in the course of a visit, a probation officer could obtain a warrant, or, under exigent circumstances, could immediately conduct a warrantless search and seizure. See *Latta v. Fitzharris*, 521 F.2d at 258 (Hufstедler, J., dissenting).

30. The majority reserved this issue for determination at a later time, but suggested that there would be circumstances under which such evidence could be admitted into a criminal prosecution. See 293 N.W.2d at 369 n.6. In his concurrence, Justice Rogosheske indicated that so long as the majority found the search reasonable, there would be "no legal basis" for excluding the evidence from a criminal prosecution. *Id.* at 370 (Rogosheske, J., concurring). In *Latta v. Fitzharris*, the evidence seized by Latta's parole officer was held to have been properly admitted in his criminal trial for possession of marijuana. 521 F.2d at 252-53.

31. 293 N.W.2d at 370-71 (Rogosheske, J., concurring). Justices Otis, Yetka, and Wahl joined in Justice Rogosheske's concurrence. *Id.*

32. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

33. A probationer or parolee who has been the victim of a warrantless search may, of course, bring a suit under 42 U.S.C. § 1983 (1976) for violation of

are confined to the probation revocation proceeding. A better approach would be to require probation officers to obtain search warrants³⁴ and to exclude evidence illegally obtained by probation officers from both probation revocation proceedings and criminal proceedings. The warrant requirement would not be so onerous as to impair the effective functioning of the probation system,³⁵ and the exclusion of illegally obtained evidence would deter abuses by probation officers and police.³⁶

C. REVOCATION OF PROBATION

Jerry Dean Austin received a suspended sentence and was placed on probation for six years after pleading guilty to aggravated assault and burglary.¹ Probation was revoked during the first year because Austin left the drug rehabilitation program to which he had been admitted, but the trial court declined to execute the original sentence and instead ordered that Austin spend ninety days in the St. Louis County Jail, to be followed by another six years of probation. Upon his release from the county jail, Austin's probation officer arranged for him to enroll in a drug rehabilitation program at Eden House in Minneapolis. Austin was told by the probation officer that "if for any reason he did not enter the program, he should return to the St. Louis County Jail."² Austin reported to Eden House as ordered on Friday, August 11, 1978, but during his initial interview indicated that "he was scared and wanted the weekend to think about his decision to enter the program."³ Austin was denied admission to the program when he returned after the weekend because the director mistakenly believed that he had failed to report on the previous Friday. Austin voluntarily returned to

his or her civil rights. As Judge Hufstедler observed, however, such a suit would be "very brave or very foolhardy," because of the possibility of retribution. 521 F.2d at 258.

34. The issuance of the search warrant might be premised on a lesser showing of probable cause than is applied for other kinds of searches. See *United States v. Bradley*, 571 F.2d 787, 790 (4th Cir. 1978) (citing *Camara v. Municipal Court*, 387 U.S. 523, 534-38 (1967)); *Latta v. Fitzharris*, 521 F.2d at 257 (Hufstедler, J., dissenting); Recent Decisions, *supra* note 16, at 880.

35. See note 29 *supra*.

36. Under *United States v. Calandra*, 414 U.S. 338, 349-51 (1974), the application of the exclusionary rule is conditioned on a showing that the deterrent effect of exclusion outweighs the impediments to the proceeding caused by exclusion.

1. The guilty plea was entered pursuant to a plea agreement. *State v. Austin*, 295 N.W.2d 246, 248 (Minn. 1980).

2. *Id.* at 249.

3. *Id.*

the St. Louis County Jail on Thursday, August 17, 1978. The trial court revoked probation and reinstated Austin's sentence on grounds that Austin violated the terms of his probation. On appeal the Minnesota Supreme Court affirmed, *holding* that in the future a trial court should revoke probation only if it finds that in light of the probationer's intentional or inexcusable violations of specified probation conditions, the balance of the competing policies underlying the decision to continue probation or reinstate the prison sentence favors incarceration.⁴ *State v. Austin*, 295 N.W.2d 246 (Minn. 1980).

Appellate courts generally defer to the discretion of the trial court in probation revocation proceedings⁵ because the trial judge is best able to evaluate the weight of the evidence and the probationer's prospects for rehabilitation.⁶ Recently, however, some appellate courts have reversed lower court revocation decisions, reasoning that "[t]he decision to revoke probation should not merely be a reflexive reaction to an accumulation of technical violations Rather, probation should be revoked only in those instances in which the offender's behavior demonstrates that he or she 'cannot be counted on to avoid antisocial activity.'"⁷ Other appellate courts have reversed trial court revocations because the probationer's failure to comply with the terms of probation was ex-

4. The court held that although the trial court did not specify the condition of probation that Austin violated, there was sufficient evidence on the record to find that Austin intentionally disobeyed his probation officer. *Id.* at 250. In addition, the court held that even though it is preferable that a probationer receive a written copy of the terms of probation, the oral instructions Austin received were sufficient under the facts of this case, *id.* at 251, and that Austin waived the issue of whether he was given sufficient notice of the grounds for revocation by failing to raise this matter at the revocation hearing. *Id.* at 252.

5. See, e.g., *Burns v. United States*, 287 U.S. 216, 221 (1932); *United States v. Burkhalter*, 588 F.2d 604, 606 (8th Cir. 1978); *Pearson v. State*, 308 Minn. 287, 293, 241 N.W.2d 490, 494 (1976); *State ex rel. Halverson v. Young*, 278 Minn. 381, 387, 154 N.W.2d 699, 703 (1967); *State ex rel. Newman v. Wall*, 189 Minn. 265, 267, 249 N.W. 37, 38 (1933). See also MINN. STAT. § 609.14 (1980).

6. See *Slayton v. Commonwealth*, 185 Va. 357, 366-67, 38 S.E.2d 479, 484 (1946).

7. *United States v. Reed*, 573 F.2d 1020, 1024 (8th Cir. 1978) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972)). Cf. *United States v. Burkhalter*, 588 F.2d 604, 606-07 (8th Cir. 1978) (*Reed* distinguished on its facts; revocation appropriate because of probationer's "inability to accept responsibility and to live within the rules of his probation"). See also *Banks v. United States*, 614 F.2d 95, 98-101 (6th Cir. 1980); Dicerbo, *When Should Probation be Revoked?*, in PROBATION, PAROLE, AND COMMUNITY CORRECTIONS 448, 448-58 (2d ed. 1976); Lasker, *Presumption Against Incarceration*, 7 HOFSTRA L. REV. 407, 407-16 (1979).

cusable,⁸ or the violation was not intentional.⁹

Similarly, the American Bar Association (ABA) recommends that probation should not be revoked and a prison sentence reinstated unless the petitioner has either committed another offense, poses a threat to society, or incarceration is necessary to demonstrate the authority of the court or the seriousness of the violation.¹⁰ The ABA standards emphasize, however, that "intermediate steps should be considered in every case," including a review and possible adjustment of the probation conditions, conferences with the probationer, and a warning that further violations could result in revocation.¹¹ Revocation should be avoided whenever possible because "technical revocations interfere with the policy of the legislature that the use of probation is to be maximized where the public safety is not endangered."¹²

The new Minnesota sentencing guidelines were formulated with a similar concern that revocation decisions "should not be a reflexive reaction to technical violations."¹³ Because the guidelines create a presumption against incarceration and in favor of probation in certain situations,¹⁴ the Sentencing Guidelines Commission urged "[g]reat restraint . . . in imprisoning those violating conditions of a stayed sentence."¹⁵ The Commission concluded that incarceration would be justified when

8. See, e.g., *State v. Nakamura*, 59 Hawaii 378, 379, 581 P.2d 759, 761 (1978) (terms of probation violated when probationer made unauthorized ten hour visit with his mother after the request to make the visit was denied; revocation reversed on the ground that the drug treatment center had been arbitrary and the lower court inflexible about considering other programs).

9. See, e.g., *Gardner v. State*, 365 So.2d 1053, 1054 (Fla. Dist. Ct. App. 1978) (no willful violation when probationer's failure to move from Missouri to Florida pursuant to order of probation officer was due to break down of probationer's car).

10. 3 ABA, STANDARDS FOR CRIMINAL JUSTICE, Standard 18-7.3(c), at 508 (2d ed. 1980).

11. *Id.*, Standard 18-7.3(d), at 508-09.

12. *Id.* at 516. See also ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION, Commentary to § 1.2, at 27-30 (Approved Draft 1970). The ABA noted three advantages to probation: (1) probation maximizes the liberty and promotes the rehabilitation of the individual "while at the same time vindicating the authority of the law and effectively protecting the public from further violations;" (2) probation is less expensive than incarceration; and (3) probation "minimizes the impact of the conviction upon innocent dependents of the offender." *Id.* Cf. Boyd, *An Examination of Probation*, 20 CRIM. L.Q. 355, 367-79 (1978) (critical discussion of the policy goals of probation).

13. MINNESOTA SENTENCING GUIDELINES COMMISSION, REPORT TO THE LEGISLATURE 21 (Jan. 1, 1980).

14. *Id.* at 10-11.

15. *Id.* at 21.

the probationer was convicted of a new felony punishable by imprisonment, or the probationer continued to violate the conditions of his or her probation after intermediate measures short of imprisonment had been utilized unsuccessfully.¹⁶

The Minnesota Supreme Court, in *Austin*, agreed that the ABA standards for probation revocation struck an appropriate balance between "the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety."¹⁷ In order to ensure uniformity in future revocation hearings, the court directed that prior to revoking probation the trial court must "1) designate the specific condition or conditions that were violated; 2) find that the violation was intentional or inexcusable; and 3) find that need for confinement outweighs the policies favoring probation."¹⁸ The court noted that "[i]n some cases, policy considerations may require that probation not be revoked,"¹⁹ but asserted that Austin's failure to show a commitment to rehabilitation indicated that treatment had failed, and that revocation was necessary in order to assert the authority of the court and emphasize the seriousness of the violation.²⁰

The *Austin* court's desire to establish uniform guidelines is commendable, particularly because the trial court's decision to revoke probation is discretionary. It is unfortunate, however, that the court did not more strongly emphasize the need to consider alternatives short of incarceration in cases involving mere technical violations of probation.²¹ As the dissent correctly asserted, alternatives to revocation and incarceration should have received serious consideration in *Austin*, particularly because the probationer required drug treatment that was not available in prison.²² In light of the majority's explicit endorsement of the ABA standards, it is somewhat puzzling that the court did not recognize that the revocation of Austin's probation was inconsistent with these standards.²³ Moreover, the

16. *Id.*

17. 295 N.W.2d at 250.

18. *Id.*

19. *Id.*

20. *Id.*

21. The court failed to indicate whether it advocated the intermediate alternatives to incarceration proposed by the ABA and the Minnesota Sentencing Guidelines Commission. For discussion of these intermediate alternatives, see text accompanying notes 11-16 *supra*.

22. 295 N.W.2d at 252-53 (Otis, J., dissenting).

23. "Revoking appellant's probation under these circumstances belies the standards to which the majority purports to adhere." *Id.* at 253.

Austin decision illustrates the need for even more specific probation revocation guidelines similar to the new sentencing guidelines. Following the procedure employed in the development of the sentencing guidelines, the legislature should create a commission that would be charged with developing appropriate criteria for the revocation of probation to ensure that revocation decisions are uniformly and sensibly made.

IV. EVIDENCE

A. HYPNOTICALLY REFRESHED TESTIMONY

Marion Erickson was bleeding profusely from a vaginal wound when police took her from a motel in Minneapolis to a hospital. Erickson was intoxicated and had no memory of how she received the cut. She had been accompanied to the motel by David Mack, who summoned the ambulance, telling the drivers that Erickson's bleeding began during sexual intercourse.¹ Six weeks later police made an appointment for Erickson to visit Beauford Kleidon, a self-taught hypnotist, in hopes of reviving her memory of a suspected assault. Under hypnosis,² Erickson related that Mack cut her with a knife. The following day, Erickson reported to police the events of her assault as she had recounted them under hypnosis,³ and as a result, Mack was arrested and charged with criminal sexual conduct and aggravated assault. The district court certified to the Minnesota Supreme Court the question of admissibility of

1. *State v. Mack*, 292 N.W.2d 764, 766 (Minn. 1980).

2. Hypnosis has been defined as a "trance-like" state into which the subject is induced and during which the subject is highly susceptible to suggestion. See Spector & Foster, *Admissibility of Hypnotic Statements: is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 570 (1977). Definitions of hypnosis range from "a state of heightened suggestibility," see Note, *Hypnotism, Suggestibility and the Law*, 31 NEB. L. REV. 575, 576 (1952), to "a state in which the critical faculties of the mind are temporarily suspended so that the subject becomes more readily suggestible," see Note, *Hypnosis as an Evidentiary Tool*, 8 UTAH L. REV. 78, 79 (1962), to a "highly suggestible state into which a willing subject is induced by a skilled therapist," see *State v. Mack*, 292 N.W.2d at 765 n.2. When effective, hypnosis can induce a mental state that facilitates recall and enables the subject to produce more information than he or she could provide in a waking state, including recall of highly traumatic events. See Haward & Ashworth, *Some Problems of Evidence Obtained by Hypnosis*, 1980 CRIM. L. REV. 469, 474. Hypnosis has been used to ascertain facts from victims of assault and kidnapping. See, e.g., *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), cert. denied, 395 U.S. 949 (1969); Haward & Ashworth, *supra* at 472; Spector & Foster, *supra*, at 580.

3. Erickson was given a "post-hypnotic suggestion" so that when she was no longer in a hypnotic trance she would remember the events she had related while under hypnosis. 292 N.W.2d at 767.

hypnotically refreshed testimony.⁴ The court found such testimony to be inadmissible, *holding* that a person who had been previously hypnotized for purposes of memory refreshment could not testify at a criminal trial on the subject matter adduced at the hypnotic interview.⁵ *State v. Mack*, 292 N.W.2d 764 (Minn. 1980).

Courts that have considered the admissibility of testimony of previously hypnotized witnesses have not resolved the question uniformly. Concerned with the unreliability of hypnotic testimony and the uncertain state of the art of hypnosis,⁶ one group of courts has refused to admit hypnotically refreshed testimony.⁷ These courts treat hypnosis as a truth ascertaining device, subject to the test of *Frye v. United States*,⁸ which requires that a truth determining device "be sufficiently established to have gained general acceptance in the particular field in which it belongs"⁹ before the evidence produced by the device is admissible. Other courts, recognizing hypnosis as an investigatory tool¹⁰ and as a useful aid to refreshing memory,¹¹ have admitted hypnotically refreshed testimony,¹² subject to a

4. *Id.* at 765. The question was raised upon motion of the defendant pursuant to Minnesota Rule of Criminal Procedure 29.02(4). The defendant also asked the court to indicate under what circumstance such testimony, if allowed, would be admissible. Brief for Petitioner at 4, *State v. Mack*, 292 N.W.2d 764 (Minn. 1980).

5. The court, however, recognized the use of hypnosis as an investigatory tool and did not foreclose its use out of court. 292 N.W.2d at 777.

6. *See, e.g.*, *State v. La Mountain*, 125 Ariz. 547, 551, 611 P.2d 551, 555 (1980) (court did not feel that "the state of the science (or art) has been shown to be such as to admit testimony which may have been developed as a result of hypnosis"); *Greenfield v. Commonwealth*, 214 Va. 710, 715-16, 204 S.E.2d 414, 419 (1974) (hypnosis considered akin to drug induced testimony because of the possibility of invention of false statements under hypnosis).

7. *See, e.g.*, *State v. La Mountain*, 125 Ariz. 547, 611 P.2d 511 (1980); *Creamer v. State*, 232 Ga. 136, 205 S.E.2d 240 (1974); *People v. Hangsleben*, 273 N.W.2d 539 (Mich. App. 1978).

8. 293 F. 1013 (D.C. Cir. 1923).

9. *Id.* at 1014. The Minnesota Supreme Court has used the rule established in *Frye* in determining whether certain evidence would be admissible. *See, e.g.*, *State v. Wakefield*, 263 N.W.2d 76, 77 (Minn. 1978) (polygraph tests); *State v. Goblirsch*, 309 Minn. 401, 407, 246 N.W.2d 12, 15 (1976) (polygraph tests). *See also* *United States v. Alexander*, 526 F.2d 161 (8th Cir. 1975) (test used to find evidence obtained from polygraph tests inadmissible).

10. *See* *Spector & Foster*, *supra* note 2, at 579-80.

11. *See id.* at 585-97.

12. Hypnotically refreshed testimony is admitted in several jurisdictions. *See, e.g.*, *United States v. Adams*, 581 F.2d 193 (9th Cir. 1978), *cert. denied*, 439 U.S. 1006 (1979); *United States v. Narcisco*, 446 F. Supp. 252 (E.D. Mich. 1977); *People v. Smrekar*, 69 Ill. App. 3d 379, 385 N.E.2d 848 (1979); *Harding v. State*, 5 Md. App. 230, 246 A.2d 302, *cert. denied*, 393 U.S. 949 (1968); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978); *State v. Brom*, 8 Or. App. 598, 494 P.2d 434 (1972).

number of safeguards.¹³ A third group of courts has admitted the testimony of a witness whose memory has been refreshed by hypnosis without requiring compliance with safeguards. These courts mitigate the problem of witness susceptibility to suggestion during the hypnotic process by requiring a jury instruction regarding the influence of suggestion, thus enabling the jury to weigh the credibility of the testimony accordingly.¹⁴

In this case of first impression, the *Mack* court was concerned with the uncertainties associated with statements made by persons in a hypnotic state, including the tainting of the testimony by suggestion during hypnosis, the mixture of confabulation with truth in the testimony, and the difficulty of effective cross-examination of the witness.¹⁵ The court treated hypnosis as a truth ascertaining device to be judged for admissibility according to the *Frye* test of "acceptance in the particular field in which it belongs."¹⁶ Because experts in the field did not agree on the acceptability of hypnosis as a method for ascertaining reliable information, the *Frye* test was not met and the evidence was not admissible.¹⁷

The court's decision that Erickson's testimony was inadmissible was correct, but the decision should have been based on different factors than those discussed in the court's opinion. Hypnosis in this case was used to refresh the memory of a witness who would testify in court from memory. It was not employed as a truth ascertaining device purporting to indicate the veracity of the witness's testimony.¹⁸ Although the *Frye* test may be an appropriate test of the admissibility of evidence gen-

13. See, e.g., *State v. Hurd*, 173 N.J. Super. 333, 414 A.2d 291, 306 (1980).

14. *United States v. Adams*, 581 F.2d 193 (9th Cir.), cert. denied, 439 U.S. 1006 (1978) (jury should be aware of the previous hypnosis session); *United States v. Narcisco*, 446 F. Supp. 252 (E.D. Mich. 1977) (jury should decide if testimony of previously hypnotized witness is believable); *People v. Smrekar*, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979) (determination that no suggestibility accompanied hypnotic process; therefore, jury must decide if testimony of witness is credible, with expert testimony as to that credibility inadmissible).

15. 292 N.W.2d at 768. See *Diamond, Inherent Problems in the Use of Pre-trial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 314 (1980) (witness hypnotized for the purpose of having his memory refreshed "contaminated" and "effectively incompetent to testify"). But see *Dilhoff, The Admissibility of Hypnotically Induced Testimony*, 4 OHIO N.U.L. REV. 1, 22 (1977) (Diamond approach characterized as "impractical and unrealistic"). See also *Warren & Roberts, Challenging the Use of Hypnotically Induced Evidence*, 9 COLO. LAW. 1142, 1150 (1980) (juries might give too much weight to testimony derived from hypnosis).

16. 293 F. at 1014.

17. 292 N.W.2d at 768.

18. 292 N.W.2d at 769. See also Brief for Respondent at 5, *State v. Mack*, 292 N.W.2d 764 (Minn. 1980).

erated by truth ascertaining devices, it is not an appropriate test for determining the admissibility of memory refreshing devices such as the hypnosis at issue in *Mack*. The test for the former attempts to measure the accuracy of the device itself as an indicator of truth; the test for the latter should indicate the reliability with which the memory refreshing device elicits accurate testimony, but the testimony itself should be weighed for credibility by the factfinder as other disputed testimony is weighed.¹⁹

The danger of unreliable testimony,²⁰ the difficulty of effective cross-examination, and the possibility that undue weight will be given by juries to hypnotically refreshed testimony could be allayed by requiring that certain safeguards be satisfied before the testimony is admitted. Effective safeguards for minimizing the danger of unreliability of the testimony were outlined during the *Mack* hearing,²¹ and have been discussed

19. See, e.g., *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969) (jury instructed to weigh carefully testimony of previously hypnotized witness). See also *United States v. Adams*, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978) ("present-recollection-refreshed" concept is applicable to pretrial hypnosis in criminal cases as well as civil cases); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978) (testimony of previously hypnotized witness should be questioned as to its credibility, not its admissibility); *State v. Brom*, 8 Or. App. 598, 494 P.2d 434 (1972) (testimony of previously hypnotized witness admissible in murder case since witness did undergo in-court cross-examination). See also Spector & Foster, *supra* note 2, at 586; National Legal Aid & Defenders Association Governing Board, Resolution on the Forensic Use of Hypnosis Passed, February 3, 1980, 37 NLADA BRIEFCASE 12 (1980) [hereinafter cited as National Legal Aid & Defenders Resolution].

20. Hypnosis is by no means a precise science. See Orne, *Hypnosis and Victim/Witness Recall*, 37 NLADA BRIEFCASE 6 (1980). Recall after hypnosis may not accurately reflect historical events. The subject may combine several experiences believing them to be part of a single happening. In addition, although hypnosis increases recall, it also increases confabulation—filling in "gaps" and unconsciously manufacturing "memories," using whatever information was previously available to the individual. *Id.* at 7. Moreover, the subject in a hypnotic trance is in a very heightened state of suggestibility and may be influenced by a hypnotist trying to verify a theory of the crime, even if the hypnotist does not consciously attempt to exert influence over the subject. See Haward & Ashworth, *supra* note 2, at 476; Orne, *supra*, at 8; Spector & Foster, *supra* note 2, at 591. As a result, without independent verification, it is difficult, if not impossible, to tell if the subject's statements represent augmented recall, or whether the subject's memory has been altered in accordance with suggestions he or she has received. Haward & Ashworth, *supra* note 2, at 475; Orne, *supra*, at 10. Furthermore, after hypnotic memory refreshing, the subject may "recall" the event with strong conviction, refusing to change the story. Thus, although there is agreement that hypnosis can enhance recall, *State v. Hurd*, 173 N.J. Super. 333, 414 A.2d 291 (1980), the nature of the art is such that it is difficult to sort out actual recall and other perception.

21. *State v. Mack*, 292 N.W.2d at 771 n.14.

by commentators.²² The suggested safeguards call for hypnosis sessions conducted by an independent psychiatrist or psychologist who is trained in hypnosis and apprised of the case in an unbiased manner. Only the subject and hypnotist are to be present at the sessions, and a video-taped record must be kept. The witness should testify at trial from present memory and should be subject to cross-examination; any facts elicited as a result of the hypnotic interview should be corroborated by other evidence. Finally, the jury should be given a forceful instruction regarding the limited role of hypnosis as a memory aid and not as an indicator of absolute truth.

Because the appropriate safeguards were not employed during Erickson's hypnosis session,²³ the *Mack* court was correct in ruling that her hypnotically refreshed testimony was inadmissible. Exclusion of hypnotically refreshed testimony because hypnosis does not meet the *Frye* test, however, unnecessarily eliminates a useful tool that can be adequately controlled for danger and uncertainty. The *Mack* decision should be confined to the particularly unreliable circumstances of the *Mack* case itself and the court should develop a test based upon the proposed safeguards as appropriate cases arise.

V. TAXATION

A. DISCRIMINATORY PROPERTY TAX ASSESSMENT

United National Corporation owned and operated a suburban shopping center in St. Louis Park, Minnesota. In 1978, the corporation decided to contest past property tax valuations on the ground that the property had been assessed unequally in comparison to other properties in the same district.¹ As evi-

22. See generally Spector & Foster, *supra* note 2, at 586; National Legal Aid & Defenders Resolution, *supra* note 19; Amicus Curiae Brief at 23, *State v. Mack*, 292 N.W.2d 764 (1980); Orne, *supra* note 20.

23. The hypnotist was not professionally trained. In addition to the hypnotist and Erickson, two policemen attended the hypnotic session; representatives of the defendant were neither present nor aware of the session. Precautions against suggestion to the subject were not employed. Although an audio tape recording of the session was made, it was subsequently lost. Erickson's statements at the trial were not corroborated by other evidence. 292 N.W.2d at 767, 772.

1. Minnesota Statutes § 273.11 requires that all property be valued for tax purposes at its market value. MINN. STAT. § 273.11(1) (1980). Unequal assessment occurs when a taxpayer's property is valued for tax purposes at a substantially higher percentage of its market value than is other property. Thus, unequal assessment can occur even when the taxpayer is assessed at less than 100% of market value. See generally Kilmer, *The Legal Requirements for Equal-*

dence of unequal assessment, the taxpayer introduced a sales ratio study,² which compared the assessed value and sales prices for 38 commercial properties sold in St. Louis Park during the three years in issue. The study indicated a range in the assessment-sales ratios of 38% to 222%.³ The Minnesota Supreme Court held that even if there was no intentional discrimination, the taxpayer could establish a prima facie case of discriminatory assessment if it could show that other properties had been arbitrarily or systematically undervalued in relation to the taxpayer's own property.⁴ The court affirmed the lower court decision against United National, however, on the ground that the taxpayer's sales ratio study failed to show the existence of systematic or arbitrary underassessment. *United National Corp. v. County of Hennepin*, 299 N.W.2d 73 (Minn. 1980).

In a second case the owner of a home valued in excess of \$200,000 also challenged assessment on the ground of inequality. The home owner, Malcolm McCannel, introduced the testimony of an appraiser with the Minneapolis assessor's office

ity in *Tax Assessments*, 25 ALB. L. REV. 203 (1961); Koeppe, *Inequality in Real Property Tax Review*, 19 BUFFALO L. REV. 565 (1970); Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 HARV. L. REV. 1374 (1962) [hereinafter cited as Note, *Inequality*]. For a comprehensive survey of state laws, see Beebe & Sinnott, *In the Wake of Hellerstein: Whither New York?* (pts. 1-3), 43 ALB. L. REV. 203, 411, 777 (1979). For a discussion of Minnesota law regarding unequal assessment, see Note, *Grounds and Procedures for Attacking Real Property Tax Assessments in Minnesota*, 4 WM. MITCHELL L. REV. 371, 383-98 (1978).

2. A sales ratio study consists of a sample of recently sold properties from which assessment-sales ratios are computed. An assessment-sales ratio is the ratio of the property's assessed value to its sales price. Sale price serves as a convenient substitute for fair market value. In Minnesota, as elsewhere, assessors keep records of the sale prices of all properties. Taxpayers typically use these records as the data base for their studies. The Minnesota Supreme Court described briefly how to compute and use the assessment ratio in a recent case. See *Anacker v. County of Cottonwood*, 302 N.W.2d 342, 343-44 (Minn. 1981). See generally INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS, *IMPROVING REAL PROPERTY ASSESSMENTS* 89-162 (1978) [hereinafter cited as *IMPROVING ASSESSMENTS*].

3. See Letter from Attorney John A. Murray to Justice Sheran (January 7, 1980).

4. *United National Corp. v. County of Hennepin*, 299 N.W.2d 73, 76 (Minn. 1980). This standard originated in *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352-53 (1918), and was adopted as Minnesota law in *Hamm v. State*, 255 Minn. 64, 70, 95 N.W.2d 649, 654-55 (1959).

The discriminatory assessment may be deemed a violation of the federal constitution, see U.S. CONST. amend. XIV; the Minnesota constitution, MINN. CONST. art. 10, § 1 ("Taxes shall be uniform upon the same class of subjects. . ."); or a Minnesota statute, MINN. STAT. § 278.01(1) (1980) ("Any person . . . who claims that [his or her] property has been partially, unfairly, or unequally assessed . . . may have the validity of [the] claim . . . determined by the district court . . . or by the tax court. . .").

that the appraised value of homes in excess of \$100,000 had not been increased as rapidly as those of other homes.⁵ McCannel also introduced evidence showing that ten homes in his neighborhood worth over \$100,000 were assessed at an average of 63% of their sale prices, as opposed to the McCannel property, which was assessed at 100% of market value.⁶ The Minnesota Supreme Court held that the deliberate treatment of houses valued at more than \$100,000 with a special method of assessment was the kind of arbitrary and systematic discrimination prohibited by the state constitution and the Minnesota Statutes.⁷ The taxpayer would be entitled to relief on remand if he could show that other houses valued over \$100,000 were substantially undervalued in relation to his own,⁸ and the proper measure of that relief would be a reduction of the taxpayer's assessed value to the average percentage of market value at which other properties in the same class are assessed.⁹ *McCannel v. County of Hennepin*, 301 N.W.2d 910 (Minn. 1980).

Although Minnesota law requires that all property be valued for tax purposes at full market value,¹⁰ properties are actually valued at varying percentages of their market values due to a number of factors. First, divergent property assessment can be the result of an intentional policy by assessors.¹¹ Such a policy may arise from political pressure¹² to favor a certain type of property, a kind of property owner, or even the property of a particular individual.¹³ Or, it may be due to an assessor's own notions about which properties ought to bear a larger tax

5. This was apparently done under the good faith but erroneous assumption that these properties were not inflating in value as fast as other homes. See *McCannel v. County of Hennepin*, 301 N.W.2d 910, 920-21 (Minn. 1980).

6. *Id.* at 921.

7. See note 4 *supra*.

8. 301 N.W.2d at 921.

9. The taxpayer also argued that various pieces of legislation instituting the "limited market value" concept in property assessments were unconstitutional, see 1975 Minn. Laws, ch. 437, art. 8, § 5; 1973 Minn. Laws, ch. 650, art. 23, but the court held this legislation constitutional. See 301 N.W.2d at 919.

10. See note 1 *supra*.

11. See, e.g., *Dulton Realty, Inc. v. State*, 270 Minn. 1, 21, 132 N.W.2d 394, 405 (1964) (assessor intentionally applied different ratios to market value of property of the same class). The case is discussed in Note, *The Minnesota Supreme Court 1964-65*, 50 MINN. L. REV. 479, 551-58 (1966).

12. One commentator has noted that with regard to Minnesota assessments, "[b]ecause of the decentralization of administration and consequent lack of supervision, traditionally local assessors have been an easy target for local political pressures." RAMSEY COUNTY LEAGUE OF MUNICIPALITIES, PROPOSALS FOR THE REFORM OF PROPERTY TAX ASSESSMENT IN MINNESOTA 15 (1970).

13. See, e.g., *Ploetz v. County of Hennepin*, 301 Minn. 410, 412, 223 N.W.2d 761, 762-63 (1974) (taxpayer alleged property of mayor treated favorably).

burden.¹⁴ A second cause of unequal assessments is the practice of reassessing the properties in a single tax district in piecemeal fashion over several years, rather than all at once in the same year. In a time of inflating property values, properties that are reassessed earlier will tend to be assessed at a higher percentage of market value than those that have yet to be reassessed.¹⁵ The actions of inexperienced, nonprofessional assessors who make poor initial estimates of market value are a third source of inequality. Finally, there is the phenomenon known as "assessment lag,"¹⁶ which results when properties are not reassessed often enough and the varying effects of inflation and changing neighborhood conditions exacerbate disparities in the ratios of assessed value to market value. Whenever these factors result in an unequal distribution of the tax burden, the equal protection clause of the federal constitution, the uniformity clause of the state constitution, and the state statute prohibiting unequal taxation may be implicated.¹⁷

In order to recover for discriminatory taxation under the equal protection clause of the federal constitution, the taxpayer must show "something which in effect amounts to an intentional violation of the essential principle of practical uniformity."¹⁸ The majority of states have incorporated this federal "intentional" standard into decisions interpreting their own uniformity clauses.¹⁹ A growing minority of states, however, do not require a showing of intent in actions brought under their uniformity clauses.²⁰ The taxpayer may recover simply by

14. See, e.g., *Dulton Realty, Inc. v. State*, 270 Minn. 1, 7, 132 N.W.2d 394, 399 (1964).

15. See, e.g., *Ploetz v. County of Hennepin*, 301 Minn. 410, 411-12, 223 N.W.2d 761, 762 (1974) (taxpayer alleged discrimination due to policy of sequential reassessment).

16. See generally D. PAUL, *THE POLITICS OF THE PROPERTY TAX* 32, 34 (1975).

17. See Manvel, *Slippage in Assessment Uniformity*, 8 TAX NOTES 44 (1979); note 4 *supra*.

18. *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 353 (1918). This has been held to occur, for example, when the assessor intentionally uses a different method to assess other property in the same class, *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 37 (1907), or when the assessor arbitrarily assigns the same assessment value to properties having different true values, *Cumberland Coal Co. v. Board of Revision of Tax Assessments*, 284 U.S. 23, 29-30 (1931).

19. See, e.g., *County of Maricopa v. North Cent. Dev. Co.*, 115 Ariz. 540, 543, 566 P.2d 688, 691 (1977); *Kittery Elec. Light Co. v. Assessors of Kittery*, 219 A.2d 728, 739 (Me. 1966); *Shell Oil Co. v. Supervisor of Assessments*, 278 Md. 659, 670, 366 A.2d 369, 375 (1976).

20. See, e.g., *Lerner Shops of Conn., Inc. v. Town of Waterbury*, 151 Conn. 79, 86-87, 193 A.2d 472, 476-77 (1963); *Tregor v. Board of Assessors*, 387 N.E.2d

proving a substantial disparity between the assessment ratio applicable to his or her property and that applicable to others.²¹ Only the minority's "disparity" standard of proof potentially provides relief for all four of the sources of assessment inequality.²²

The second major issue in unequal assessment cases is the proper measure of relief. A few courts reduce the taxpayer's assessment to a level set by statute.²³ This solution promotes the policy of inter-district uniformity, but generally does not provide the taxpayer with as much compensation as the other methods.²⁴ Another group of courts reduce the taxpayer's assessment to the lowest level enjoyed by others in the district.²⁵ This measure of relief has been criticized as giving the taxpayer a windfall, exacerbating assessment inequality, and endangering the local tax base.²⁶ Most courts reduce the taxpayer's assessment to a level corresponding to the average for the district. This average figure may be represented by the median assessment ratio,²⁷ the weighted mean,²⁸ the un-

538, 540 (Mass. 1979), *cert. denied*, 444 U.S. 841 (1979); *Piscataway Assoc., Inc. v. Township of Piscataway*, 73 N.J. 546, 550, 376 A.2d 527, 529 (1977); *Deitch Co. v. Board of Prop. Assessment, Appeals & Review*, 417 Pa. 213, 220, 209 A.2d 397, 401 (1965).

21. The taxpayer may prove the element of disparity, which is necessary under both the majority and minority approaches, in at least three ways: (1) have a private assessor assess several neighboring properties and calculate their assessment ratios, *see, e.g.*, *Tilsac Corp. v. Assessor of Huntington*, 55 Misc. 2d 431, 432-40, 285 N.Y.S.2d 533, 534-42 (Sup. Ct. 1967); (2) rely on assessment ratios computed in a state-sponsored study, *see, e.g.*, *Tri-Terminal Corp. v. Borough of Edgewater*, 68 N.J. 405, 408, 346 A.2d 396, 398 (1975), *cert. denied*, 425 U.S. 958 (1976); or (3) conduct a sales ratio study, *see note 2 supra*, the method employed in both of the present cases. *See generally* O. OLDMAN & F. SCHOETLE, *STATE AND LOCAL TAXES AND FINANCE* 275-89 (1974).

22. *See* text accompanying notes 11-16 *supra*.

23. *See, e.g.*, *Gordon v. Hiatt*, 214 Kan. 690, 695, 552 P.2d 942, 947 (1974).

24. Often, the taxpayer will be starting with an assessment ratio already below the statutory level, but will argue that relief is due on grounds that others are still lower. In such cases, the statutory remedy provides no relief at all.

25. *See, e.g.*, *Board of Assessors v. Curtis*, 375 Mass. 493, 501, 378 N.E.2d 655, 660 (1978); *Dulton Realty, Inc. v. State*, 270 Minn. 1, 21, 132 N.W.2d 394, 408 (1964); *Chicago, R.I. & P. Ry. v. Young*, 60 S.D. 291, 297, 244 N.W. 370, 373 (1932).

26. *See, e.g.*, Note, *Inequality*, *supra* note 1, at 1391-92.

27. The median is statistically the most attractive choice as a measure of central tendency in this context because it is not greatly affected by the presence of outlying observations. The computation of the median and its statistical properties is presented in *IMPROVING ASSESSMENTS*, *supra* note 2, at 124-25. Despite its attractiveness, courts have generally overlooked the median as an indicator of average assessment ratio.

28. The weighted mean reflects the average assessment ratio on a dollar for dollar basis. It is computed by dividing the sum total assessed value for all properties by the sum total sales (or market) value. Thus, it is influenced by

weighted mean,²⁹ or the mode,³⁰ although there is no clear consensus as to which statistical indicator is most appropriate.³¹

Prior to *United National* and *McCannel*, Minnesota was in the majority as to the standard of proof, and in the minority as to the measure of relief. In 1959, the Minnesota Supreme Court held in *Hamm v. State*³² that it was necessary to show "systematic, arbitrary, or intentional undervaluation of some property as compared to the valuation of other property," but the court also cited with approval language from federal case law suggesting that something tantamount to intent was required for any cause of action.³³ The question of the proper measure of relief, left open in *Hamm*, was determined in *Dulton Realty*,

more expensive properties to a greater extent than by less expensive ones. See IMPROVING ASSESSMENTS, *supra* note 2, at 126-27. Its appropriateness as a measure of overall assessment performance is debatable. One commentator has shown that the use of the weighted mean will tend to give an advantage to the owners of expensive property. See Rosett, *Inequity in the Real Property Tax of New York State and the Aggravating Effects of Litigation*, 23 NAT'L TAX J. 66, 70-72 (1970). Nevertheless, some courts have used or endorsed the use of the weighted mean for this purpose. See *Bemis Bros. Co. v. Claremont*, 98 N.H. 446, 452, 102 A.2d 512, 516 (1954); *Ernest W. Hahn, Inc. v. County Assessor*, 92 N.M. 609, 614, 592 P.2d 965, 970 (1978).

29. The unweighted mean reflects the average assessment ratio on a property by property basis. It is computed by summing the individual assessment ratios and dividing by their number. Although arguably more appropriate as a measure of overall assessment performance than the weighted mean, it is more influenced by skewness than is the median, and when applied to sales data, is a statistically biased indicator of the mean ratio of true market value. See IMPROVING ASSESSMENTS, *supra* note 2, at 126; Cheng, *The Common Level of Assessment in Property Taxation*, 23 NAT'L TAX J. 50, 52-59 (1970). The unweighted mean has been applied or endorsed by courts in several cases. See, e.g., *State v. Kennedy*, 52 Ala. App. 470, 476, 294 So.2d 439, 443 (Civ. App. 1974); *Tri-Terminal Corp. v. Borough of Edgewater*, 68 N.J. 405, 413 n.4, 346 A.2d 396, 400 n.4 (1975), *cert. denied*, 425 U.S. 958 (1976).

30. The mode is the single ratio appearing most frequently in the group of properties sampled. Its use is endorsed by Cheng, *supra* note 29, at 64, but one of its drawbacks is that it requires a large number of observations.

31. The Minnesota Supreme Court itself appears uncertain as to whether to rely on the weighted or unweighted mean. In *United National*, the court faulted the plaintiff for not having "weight[ed] the figures to account for differences in value." *United National Corp. v. County of Hennepin*, 299 N.W.2d 73, 75 (Minn. 1980). In the *McCannel* decision, however, the court made no objection to the use of unweighted figures. See 301 N.W.2d at 921-22.

Many courts have rendered decisions based on the use of mean ratios without specifying whether they were referring to weighted or unweighted means. See, e.g., *Koblentz v. Board of Revision*, 5 Ohio St. 2d 214, 215-16, 215 N.E.2d 384, 386-87 (1966); *Deitch Co. v. Board of Prop. Assessment, Appeals & Review*, 417 Pa. 213, 220-21, 209 A.2d 397, 401 (1965); *Baken Park, Inc. v. County of Pennington*, 79 S.D. 156, 164-65, 109 N.W.2d 898, 902 (1961). But see *In re Appeals of Kents 2124 Atl. Ave., Inc.*, 34 N.J. 21, 32, 166 A.2d 763, 769 (1961) (explicitly considers both weighted and unweighted means).

32. 255 Minn. 64, 95 N.W.2d 649 (1959).

33. *Id.* at 69, 95 N.W.2d at 654.

*Inc. v. State*³⁴ to be a reduction to the lowest assessment ratio applied by the assessor for any class of property within the taxing district.³⁵

In *United National* the court held that it was not necessary to prove that the assessor intended to produce unequal and discriminatory taxation; systematic or arbitrary undervaluation would also be actionable.³⁶ The court argued that the *Hamm* requirement of intent was mere dictum and was not compelled by the federal constitution.³⁷ Furthermore, the court noted that recent Minnesota Tax Court decisions had already dispensed with the intent criterion.³⁸ Although the court abandoned the intent requirement, it neither chose to follow the minority states and allow recovery on a simple showing of substantial disparity,³⁹ nor explicate a clear intermediate standard.⁴⁰

In *McCannel*, the court attempted to clarify this standard, holding that the deliberate treatment of some properties with a special method of assessment that results in substantial undervaluation was arbitrary or systematic discrimination.⁴¹ The court concluded that the assessor's policy of assessing homes valued at over \$100,000 differently from other properties amounted to deliberate underassessment, but that *McCannel* had failed to prove that these properties were substantially undervalued in relation to his own. The court stated that, if the taxpayer prevailed on remand, the proper measure of his recovery would be a reduction in assessment commensurate with the average ratio for other properties in the same class.⁴² Although the court rejected the previous rule, which measured recovery by the difference between the taxpayer's assessment ratio and the assessment ratio enjoyed by the most favored group of properties in the district,⁴³ it suggested that the more

34. 270 Minn. 1, 132 N.W.2d 394 (1964).

35. *Id.* at 21, 132 N.W.2d at 408. The taxing district was defined as the municipality, not the county.

36. 299 N.W.2d at 76.

37. The court traced the *Hamm* dictum back to United States Supreme Court decisions and said that the requirement of purposeful discrimination served the ends of federal-state comity by not allowing too many state taxpayers to recover in federal courts. *Id.* at 76 n.3.

38. See *Pillsbury Co. v. Commissioner of Revenue*, No. 2578 (Minn. T.C. 1980); *Northland Land Co. v. County of Dakota*, No. 83469 (Minn. T.C. 1978).

39. 299 N.W.2d at 77. For examples of the minority position, see cases cited in note 20 *supra*.

40. 299 N.W.2d at 77.

41. 301 N.W.2d at 921.

42. *Id.* at 922.

43. See *Dulton Realty, Inc. v. State*, 270 Minn. 1, 21, 132 N.W.2d 394, 408 (1964).

generous measure of recovery would still apply when the appraiser intentionally discriminates in assessments.⁴⁴

In *McCannel* and *United National*, the court attempted to steer a middle course between the federal requirement of intentional discrimination and the minority standard of simple disparity in assessment.⁴⁵ The court's definition of arbitrary or systematic discrimination is ambiguous, however, and may not actually amount to anything different from the intentional standard.⁴⁶ The court should have followed the minority and recognized a cause of action under the state's uniformity clause whenever the taxpayer can point to a substantial disparity between his or her own assessment ratio and that of other taxpayers. This approach has the advantage of extending relief to taxpayers who are adversely affected by extrinsic factors, such as assessment lag,⁴⁷ or who are the victims of a singular, though substantial assessment error. It would also provide relief in those instances in which the disparity is the product of many years of neglect of the taxrolls, with the assessment ratios showing no tendency to cluster systematically.⁴⁸ Although the disparity standard places considerable reliance on sales ratio studies and attendant statistical testimony, this is also the case with the federal intentional standard.⁴⁹ Furthermore, there is no indication that a flood of litigation has resulted in the states that have adopted the disparity standard.

Regardless of whether the court relies on its current stan-

44. See 301 N.W.2d at 922 n.8.

45. See *id.* at 921; *United National Corp. v. County of Hennepin*, 299 N.W.2d at 77.

46. The federal standard does not require bad faith on the part of the assessor to prove intent to discriminate. See *Cumberland Coal Co. v. Board of Revision of Tax Assessments*, 284 U.S. 23, 25 (1931). It is sufficient to show "something which in effect amounts to an intentional violation of the principle of practical uniformity." *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 353 (1918). In *McCannel*, the court stated that "deliberate" use of a special assessment method resulting in substantial undervaluation amounted to arbitrary or systematic discrimination. 301 N.W.2d at 921. It is difficult to see why this would not be sufficient for a cause of action under the federal standard. See *Cumberland Coal Co. v. Board of Revision of Tax Assessments*, 284 U.S. at 25, 29-30.

47. See text accompanying note 16 *supra*. Since inequality induced by inflation or changing neighborhoods is not necessarily related to deliberate conduct by an assessor, the court's current standard would not provide relief for assessment lag regardless of the size of the disparity.

48. This may have been the situation in *United National*, where commercial properties were assessed at a wide range of levels. See text accompanying note 3 *supra*.

49. See, e.g., *Kittery Elec. Light Co. v. Assessors of Kittery*, 219 A.2d 728, 742 (Me. 1966).

dard or adopts the minority approach, the taxpayer must prove that there is a substantial disparity between the level at which he or she is assessed and the level at which others are assessed. In *McCannel*, the court pointed to the difference between the taxpayer's assessment ratio and the average ratio for the group of homes valued at over \$100,000,⁵⁰ but the preferable method would have been to compare the taxpayer's assessment ratio with the average⁵¹ ratio for all properties in the district.⁵² Minnesota law requires that all property be assessed at full market value,⁵³ and equality demands that if properties are assessed at less than full market value, each property should be undervalued by the same percentage. The problem with the court's suggested approach to determining undervaluation in *McCannel* is that it would be possible for the taxpayer to gain relief if his property is less favorably assessed than other homes valued at \$100,000 even if his property is more favorably assessed than the average for the district.⁵⁴ The court's suggested approach may promote equality in the distribution of the tax burden among owners of homes valued in excess of \$100,000, but not among property owners as a whole.⁵⁵ A final reason for favoring the total average as the benchmark for determining substantial inequality is that it is consistent with the preferred measure of relief: reduction of the taxpayer's assessment ratio to the total average level for the district.⁵⁶

The *McCannel* court elected as a remedy a reduction of the

50. See 301 N.W.2d at 921.

51. The preferable measure of this average point would be the median. See notes 27-30 *supra* and accompanying text.

52. See, e.g., *Deitch Co. v. Board of Prop. Assessment, Appeals & Review*, 417 Pa. 213, 223, 209 A.2d 397, 402 (1965).

53. MINN. STAT. § 273.11(1) (1980).

54. The court has apparently confused the use of comparable properties to estimate the actual market value of the subject property with the use of comparable properties to compare assessment ratios. In the former use, the properties used for comparison must clearly be similar to the subject property. If the subject property is a house, the comparables must be of approximately the same size, located in similar neighborhoods and of similar age. For the latter purpose, however, where the taxpayer is merely computing in percentage terms how close to market value other properties are assessed, any property may be regarded as comparable. The Minnesota Supreme Court is not the first to make this mistake. See *Mason v. Board of Review*, 250 Iowa 291, 295, 93 N.W.2d 732, 734 (1958) (other properties which were not fire-proofed held not comparable for purposes of proof of unequal assessment).

55. See also *Robinson v. Stewart*, 216 Or. 532, 536-37, 339 P.2d 432, 434-35 (1959). See generally Note, *Inequality*, *supra* note 1, at 1390-91.

56. This is desirable because otherwise there might be illegal inequality, but no form of relief. The United States Supreme Court held in *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446-47 (1923), that it is impermissible

taxpayer's assessment to the average for the group of similar, \$100,000 homes. As the court recognized, the measure of relief established in *Dulton*⁵⁷—reducing the taxpayer's assessment ratio to the level of the most favored individual or group—has serious drawbacks. Because there will often be some properties that are assessed absurdly low, this measure of relief conveys a windfall to the litigating taxpayer, thus exacerbating inequality and increasing unfairness to taxpayers who are assessed at or about the average for all properties. Not only is this unfair, but it also provides an incentive for plaintiffs to litigate that may overburden the courts. The *McCannel* court therefore endorsed the remedy of reducing the taxpayer's assessment ratio to the average for the group of \$100,000 homes. Since these homes are apparently assessed below the total average,⁵⁸ however, the effect of this solution in this case is similar to the *Dulton* approach: the court is compounding one underassessment with another, increasing inequality in the tax district, and giving the litigant too great a reward. Thus, both for purposes of determining whether a substantial disparity in assessment existed and for calculating relief, if any, the *McCannel* court should have remanded for evidence on the total average assessment ratio for all property in the district.⁵⁹

to deny all practical relief to a taxpayer who is injured by discriminatory assessments.

Another important advantage inherent in recognizing that all properties in a district are relevant in determining whether there has been unequal taxation pertains to the development of sales ratio studies. In both *United National* and *McCannel*, the court held the taxpayer's sales ratio studies inadequate for two primary reasons: insufficient sample, and the indiscriminate use of sale price as a proxy for market value. Given the court's restrictive interpretation of the taxpayer's "class," and the fact that in Minnesota the taxing district is the municipality, rather than the county, there will be many instances when it will not be possible to collect a sufficient sample for the study—there will simply not be enough sales of a specific kind of property in a given year. By recognizing that all properties may be used in the study, however, the potential sample increases greatly. A larger sample would not only solve the problem of statistical significance, it would also mitigate the inaccuracies associated with using sales prices as proxies for true market value because sale prices tend to fluctuate randomly around the mean of fair market value of properties. As the number of transactions increases, this mean fair market value becomes fixed with greater certainty. See generally Cheng, *supra* note 29, at 54-55.

57. 270 Minn. 1, 132 N.W.2d 394 (1964).

58. This inference is drawn from the testimony that the appraised values of the \$100,000 homes were not increased as rapidly as those of other homes during the years in question. See 301 N.W.2d at 920.

59. If it is determined that the taxpayer is assessed substantially above the level of other homes valued over \$100,000, yet below the average level for all properties, the appropriate form of relief would be a procedure compelling the assessor to raise the assessment levels of the \$100,000 homes to the total average. See Note, *Inequality*, *supra* note 1, at 1391.

VI. TORTS

A. BYSTANDER RECOVERY

On a September evening in 1975, Mrs. Stadler was conversing with a friend in a park a few yards from a road. Her five-year old son was with her and wished to cross the road to play. Mrs. Stadler gave him permission to do so. A few seconds later she heard the sound of screeching brakes and turned to see her son fly through the air and hit the pavement. Her husband was expecting his wife and child to join him in the park that evening but he was unaware that they had arrived. Although he did not witness the accident, Mr. Stadler was nearby when it occurred, and ran to the scene when he heard the noise. Only then did he realize that his son was involved. The boy was not killed, but suffered severe brain damage. Mr. and Mrs. Stadler brought suit against the negligent driver, alleging that they suffered emotional and mental distress with resultant physical symptoms from witnessing the accident. The trial court dismissed the suit for failure to state a claim upon which relief could be granted. On appeal, the Minnesota Supreme Court affirmed, *holding* that bystanders who witness negligently caused injury to another and as a result suffer mental distress with physical symptoms do not have a valid cause of action unless they too were within the zone of danger and feared for their own safety. *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980).

Courts are divided as to whether and under what circumstances a bystander should be allowed to recover for mental distress caused by witnessing injury to another.¹ A handful of states still maintain the old "impact" standard,² which requires that the plaintiff allege that he or she suffered some physical

1. The academic commentators, on the other hand, are virtually unanimous in their preference for the *Dillon* standard, described in text accompanying notes 6-8 *infra*. See, e.g., W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 54 (4th ed. 1971); Joseph, *Dillon's Other Leg: The Extension of the Doctrine Which Permits Bystander Recovery for Emotional Trauma and Physical Injuries to Actions Based on Strict Liability in Tort*, 18 DUQ. L. REV. 1, 22 (1979); Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 165 (1976); Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S L. REV. 1, 39 (1976). But see Note, *Negligent Infliction of Emotional Distress Recognized as Independent Tort*, 29 DEF. L.J. 424, 430 (1980).

2. See *Butchikas v. Travelers Indem. Co.*, 343 So.2d 816, 819 (Fla. 1977); *Benza v. Shulman Air Freight*, 46 Ill. App. 3d 521, 523, 361 N.E.2d 91, 93 (1977); *Boston v. Cheasapeake & O. Ry.*, 223 Ind. 425, 430, 61 N.E.2d 326, 328 (1945); *Herrick v. Willis*, 439 S.W.2d 942, 943 (Ky. 1969); *Williams v. School Dist. of Springfield R-12*, 447 S.W.2d 256, 266 (Mo. 1969).

impact from the negligent force. The majority of states³ have abandoned this standard for a "zone of danger" test which does not require that the bystander suffer a physical impact, but only that he or she be within the zone of physical danger.⁴ With only a few exceptions, states adhering to these standards base the bystander's right to recover upon fear for his or her own safety, rather than fear for another person.⁵ A growing minority of states,⁶ following the California Supreme Court's decision in *Dillon v. Legg*,⁷ have rejected the "zone of danger" test in favor of a less mechanical approach. Rather than simply concluding that the bystander outside of the zone of danger is an unforeseeable plaintiff, the *Dillon* court held that the foreseeability of a bystander's mental distress must be determined on a case-by-case basis. In a *Dillon* analysis three factors are typically considered: the bystander's physical proximity to the accident, whether the bystander directly observed the incident, and whether the bystander and the victim were closely related.⁸ When all three conditions are satisfied, the plaintiff may recover for mental distress resulting in physical symptoms.

Prior to *Stadler*, the Minnesota Supreme Court had not ruled on a case involving the mental distress of a person outside of the zone of danger who witnessed negligently-inflicted injury to another. The court, however, had held that a

3. See, e.g., *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979); *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 947 (1935).

4. The usual formulation of the test is that the plaintiff must be within the zone of physical danger and have feared for his or her own safety. A defendant owes no duty to anyone outside of that area. See, e.g., *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 947 (1935).

5. Some courts have used the zone of danger standard to allow recovery for distress due to fear for another. See, e.g., *Keck v. Jackson*, 122 Ariz. 114, 116, 593 P.2d 668, 670 (1979); *Bowman v. Williams*, 164 Md. 397, 165 A. 182 (1933).

6. Currently, these states include California, Hawaii, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island, and Texas. See *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974); *Dziokonski v. Badineau*, 375 Mass. 555, 380 N.E.2d 1295 (1978); *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979); *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979); *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975); *Landreth v. Reed*, 570 S.W.2d 486 (Tex. 1978). See also *Hunsley v. Giard*, 87 Wash. 2d 424, 553 P.2d 1096 (1976).

In addition, a Michigan appellate court has followed *Dillon*. *Toms v. McConnell*, 45 Mich. App. 647, 207 N.W.2d 140 (1973). In Connecticut, the lower courts have split. Compare *D'Amicol v. Alvarez Shipping Co.*, 31 Conn. Supp. 164, 326 A.2d 129 (Super. Ct. 1973) with *McGovern v. Piccolo*, 33 Conn. Supp. 225, 372 A.2d 989 (Super. Ct. 1976).

7. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

8. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

person within the zone of danger and fearing for his or her own safety may recover for emotional distress when physical injury resulted.⁹ In *Stadler*, the court explicitly rejected the *Dillon* rule in favor of the zone of danger test. The court viewed the zone of danger test as having the virtues of simplicity, certainty, and objectivity, characterizing the *Dillon* standard, on the other hand, as incapable of being consistently and meaningfully applied by courts and juries. Applying the zone of danger test, the court affirmed the trial court's dismissal because the Stadlers were clearly outside of the zone of danger when the accident occurred.¹⁰

The *Stadler* court's criticism of *Dillon* focused on two specific objections. First, the court indicated that the *Dillon* criteria, even if they were to remain unchanged, would yield arbitrary results because of their inability to circumscribe the area of liability.¹¹ The requirements of physical proximity and direct perception of the accident would appear, for example, to deny recovery to a parent who happened upon the scene a short time after the event, even though the parent's distress could be as great as the distress of the parent who was nearby and directly witnessed the accident. Similarly, the requirement of a close familial relationship could mean that a fiancé or a life-long friend would not be able to recover¹² even though that person's relationship with the victim could be as close as a family member's. Although these arguments may be grounds for

9. See *Okrina v. Midwestern Corp.*, 282 Minn. 400, 165 N.W.2d 259 (1969); *Purcell v. St. Paul Ry.*, 48 Minn. 134, 50 N.W. 1034 (1892). The Minnesota Supreme Court, in *Purcell*, was the first to allow recovery in a purely negligent situation for injury due to fright in the absence of a physical impact. The court had not, however, allowed recovery for a person who was not personally endangered when witnessing an intentional wrong to another, see *Sanderson v. Northern Pac. Ry.*, 88 Minn. 162, 92 N.W. 542 (1902), or for a person who did not personally witness an accident, see *State Farm Mut. Auto. Ins. Co. v. Village of Isle*, 265 Minn. 360, 122 N.W.2d 36 (1963).

10. Mr. and Mrs. Stadler believed that they both would receive recovery under the *Dillon* rule. Mr. Stadler's recovery would depend on whether the *Dillon* test is interpreted to require that the witness visually observe the accident while it is happening, or whether it would be sufficient to hear the accident, immediately rush to the scene, and then view the injured victim. In *Dillon*, the California Supreme Court stated that recovery would depend on "[w]hether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence." *Dillon v. Legg*, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

11. 295 N.W.2d at 554-55.

12. See, e.g. *Drew v. Drake*, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980) (declining to extend recovery to "de facto spouses" who had lived together for three years). But cf. *Mobaldi v. Regents of Univ. of Calif.*, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976) (foster parent allowed recovery).

adopting a rule more liberal than the *Dillon* standard, it seems questionable to point to the arbitrary limits of recovery under *Dillon* as a reason for adopting the more restrictive zone of danger standard.

Second, the *Stadler* court may have been concerned that, because the *Dillon* criteria impose seemingly arbitrary limits on recovery, a succession of difficult cases could erode all three criteria, allowing a much broader range of recovery. An uncertain standard of liability would then arise, but more importantly, the court would be unable to keep certain cases from the jury through the use of a summary judgment.¹³ In California, however, where *Dillon* is now thirteen years old, there has been no appreciable erosion of the three criteria.¹⁴ The California experience and the desirability of providing recovery to plaintiffs such as the Stadlers, support the adoption of the *Dillon* rule, despite the possibility that some increase in the number of suits brought by witnesses of negligently caused injuries may result.

B. LIABILITY OF PARENT TO CHILD

Two-year-old Breeanna Anderson asked her parents if she could go outside and play. She was granted permission, but was told to stay in the back of the house. About ten or fifteen minutes later a neighbor, Edna Stream, backed her car down the common driveway between the Stream and Anderson residences and ran over Breeanna's leg. Edward Anderson, as guardian of his daughter and in an individual capacity, sued the Streams for the injuries. The defendants cross-claimed against Anderson and his wife for contribution and indemnity but the parents moved for summary judgment against the neighbors, alleging that no right of contribution existed due to the doctrine of parental immunity. The district court granted the parents' motion, and the defendants appealed.¹ In a similar case, James Nuessle and his three-year-old son went on an errand to a drugstore. Several seconds after entering the store Nuessle missed his son and saw him crossing the street alongside an adult male. In a state of panic, Nuessle hurried outside and, without looking for traffic, called for his son. The child turned around, started back toward his father, and was struck by an

13. The *Stadler* case itself was disposed of at the trial court level by summary judgment.

14. See, e.g., *Drew v. Drake*, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980).

1. 295 N.W.2d 595 (Minn. 1980).

automobile. In the son's action for damages against his father, the father moved for summary judgment on the ground of parental immunity. The trial court granted the motion and plaintiff appealed.² In these consolidated cases, the Minnesota Supreme Court abolished the doctrine of parental immunity and adopted a reasonable parent standard, *holding* that the conduct of a parent in a parent-child action for negligence is to be judged by the jury in light of what "an ordinarily reasonable and prudent person—taking into account the parent-child relationship—[would] have done in similar circumstances."³ *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980).

Originally, an unemancipated minor in Minnesota could not sue his or her parent in tort for either willful or negligent conduct.⁴ Fifty years ago the rule was modified to permit actions against parents for intentional torts, leaving them im-

2. *Id.* at 597.

3. *Id.* at 601. The reasonable parent standard originated in the California case of *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

4. *Lund v. Olson*, 183 Minn. 515, 516, 237 N.W. 188, 188 (1931); *Taubert v. Taubert*, 103 Minn. 247, 249, 114 N.W. 763, 764 (1908). The doctrine of parental immunity in tort has a curious history. At common law a minor child could always maintain an action against his or her parent to enforce contract or property rights. *See, e.g.*, *Preston v. Preston*, 102 Conn. 96, 125, 128 A. 292, 302 (1925); *King v. Sells*, 193 Wash. 294, 297, 75 P.2d 130, 131 (1938). Although there are no English cases on point, Scottish and Canadian courts have allowed children to sue their parents in tort. *Young v. Rankin*, [1934] Sess. Cas. 499 (Scot. 2d Div.); *Deziel v. Deziel*, [1953] 1 D.L.R. 651 (Can.). Commentators have speculated that English law permits children to sue their parents in tort subject to the parents' privilege to enforce reasonable discipline against the child. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 116 (4th ed. 1971).

In the United States, however, a child originally could not sue his or her parent for even an intentional tort. The doctrine of parental immunity (distinguished from child-parent immunity which immunizes children against suits initiated by their parents) originated in *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891). Soon thereafter the parental immunity doctrine was accepted by the majority of United States courts. W. PROSSER, *supra*, § 116. *See also* *Balts v. Balts*, 273 Minn. 419, 426-29, 142 N.W.2d 66, 71-72 (1966).

The rationales cited in support of parental immunity include: (1) preservation of domestic tranquility; (2) promotion of parental care and authority; (3) discouragement of fraud and collusion; and (4) avoidance of depletion of family resources. *See Note, The Minnesota Supreme Court 1967-68, Torts: Abrogation of Parental Immunity*, 53 MINN. L. REV. 1026, 1107 (1969).

Jurisdictions vary in their approach to parental immunity. Approaches to the problem include: (1) total abrogation of immunity, *see, e.g.*, *Peterson v. City & County of Honolulu*, 51 Hawaii 484, 486, 462 P.2d 1007, 1008-09 (1970); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194, 297 N.Y.S.2d 529, 532 (1969); (2) the "reasonable parent" standard enunciated in *Gibson v. Gibson*, 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971); (3) abrogation of immunity except for activities associated with family relationships or objectives, *see, e.g.*, *Schenk v. Schenk*, 100 Ill. App. 2d 199, 206, 241 N.E.2d 12, 15 (1968); (4) abrogation with specific exceptions, *see, e.g.*, *Goller v. White*, 20 Wis. 2d 402, 413, 122 N.W.2d 193, 198 (1963); or (5) retention of parental immunity,

mune from liability for negligence.⁵ In *Silesky v. Kelman*,⁶ the court abrogated parental immunity in negligence cases except when the alleged negligent act involved an exercise of reasonable parental authority over the child, or when the act involved an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.⁷

In *Anderson* the court recognized that the scope of the *Silesky* exceptions was unclear, and therefore could lead to "arbitrary line-drawing." The court maintained, however, that such difficulties in interpretation are not sufficient to abandon the *Silesky* approach.⁸ The court rested its decisions on the suitability of a reasonable parent standard as a means of protecting parental discretion while allowing compensation for injuries. The court emphasized that the reasonable parent standard will not hold parents to such a high standard that any misjudgment would lead to liability; reasonability will be determined in light of "'all of the relevant facts and circumstances.'" ⁹ The majority asserted that this approach would avoid the difficulties of interpretation found under *Silesky*, and that juries are capable of determining reasonable parental conduct.¹⁰

In his dissent Justice Rogosheske emphasized the special nature of the parent-child relationship and argued that the

see, e.g., *Ooms v. Ooms*, 164 Conn. 48, 51, 316 A.2d 783, 785 (1972); *Skinner v. Whitley*, 281 N.C. 476, 484, 189 S.E.2d 230, 235 (1972).

5. See *Belleson v. Skilbeck*, 185 Minn. 537, 539, 242 N.W. 1, 2 (1932). Although the presence of liability insurance originally had no bearing on the doctrine of parental immunity, later decisions predicated the abrogation of immunity partially on the basis of the widespread prevalence of liability insurance. See, e.g., *Goller v. White*, 20 Wis. 2d 402, 411-12, 122 N.W.2d 193, 197 (1963). See also *Gibson v. Gibson*, 3 Cal. 3d 914, 922, 92 Cal. Rptr. 288, 293, 479 P.2d 648, 653 (1971); note 9 *infra*.

6. 281 Minn. 431, 161 N.W.2d 631 (1968).

7. *Id.* at 442; 161 N.W.2d at 638. *Silesky* involved a suit by a minor against his mother to recover for injuries suffered in an automobile accident. The court refused to apply the immunity doctrine, reasoning that any possible disruption of family harmony is negated by the prevalence of automobile insurance.

8. 295 N.W.2d at 599. For example, it is difficult for a trial court to determine what is meant by "reasonable" in the first exception and "ordinary" in the second.

9. *Id.* at 599 (quoting *Nolechek v. Gesuale*, 46 N.Y.2d 332, 346, 385 N.E.2d 1268, 1277, 473 N.Y.S.2d 340, 349 (1978) (Fuchsberg, J., concurring)).

10. Further, the court reasoned that abolition of the *Silesky* exceptions would not unduly increase intrafamilial discord; on the contrary, the court reasoned that when liability insurance is available to pay a claim against the parent, the likelihood of strife within the family is greater when the parent is protected by the *Silesky* exceptions. *Id.* at 600.

Silesky exceptions are superior to the reasonable parent standard in protecting this relationship. He stated that the *Silesky* exceptions are designed to protect the various ways parents choose to carry out their obligations, and thereby promote the integrity of the family and a productive family atmosphere. Justice Rogosheske argued that there are a number of distinct problems with the reasonable parent standard of liability adopted by the majority. Most significantly, the majority's approach would substitute a juror's views on childrearing for those of the parent. He argued that this is inevitable because jurors have strong views on childrearing and jury instructions will not deter them from imposing their own ideas of appropriate parental conduct.¹¹

Adoption of the reasonable parent standard is a welcome improvement in Minnesota tort law. It is easier to apply than the *Silesky* exceptions and provides sufficient protection for the parent. The reasonable parent standard eliminates the need for a preliminary decision by the trial judge on the categorization of parental conduct, and allows the jury to determine parental liability on the basis of the reasonableness of the conduct. Despite the dissent's concerns, the confidence of the *Anderson* majority that the new standard will be effectively and equitably applied by juries is reasonable in light of the jury's central role as a factfinder in our judicial system and the experience with jury application of the reasonable person standard in other contexts.

C. STANDARD OF MALICE IN DEFAMATION

Plaintiff Neil Stuempges was a Parke Davis sales representative with fifteen years seniority when he was assigned to a new sales manager, Robert Jones. Jones and Stuempges clashed immediately, disagreeing on several points involving sales techniques. Approximately one year later, Jones gave Stuempges a choice of resigning his position with Parke Davis or being fired. Stuempges agreed to resign and in return Parke Davis and Jones agreed to provide Stuempges with a good rec-

11. Justice Rogosheske rejected the contention that the existence of liability insurance supports the abolition of parental immunity because not all parents are adequately insured and because under Minnesota law juries are not informed when an insurance company is the real party in interest. Because a jury may not realize that a defendant parent is insured and desires recovery for his or her child, the jury may not be able to assess the credibility of a parent's testimony adequately. *Id.* at 603 (Rogosheske, J., dissenting).

ommendation to prospective employers. Shortly after his resignation, Stuempges registered with an employment agency specializing in sales personnel. When the agency called Jones for a recommendation, Jones did not give Stuempges the favorable recommendation promised, and disparaged Stuempges' sales ability. As a result of the unfavorable recommendation, the agency refused to place Stuempges with a new employer. Stuempges initiated a defamation action against Parke Davis. Parke Davis unsuccessfully defended on the ground that the statements were conditionally privileged. The jury awarded Stuempges actual, compensatory, and punitive damages. Parke Davis appealed, contending that the trial court should have applied the United States Supreme Court's standard of actual malice established in *New York Times v. Sullivan* in determining liability and in awarding punitive damages.¹ The Minnesota Supreme Court rejected both arguments, *holding* that in an employment context the prevailing Minnesota common law standard of malice² is the appropriate standard of fault for determining liability and the appropriate standard for the award of punitive damages. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980).

At common law a statement is defamatory if it is communicated to a third party, is false, and tends to harm the plaintiff's reputation and lower him or her in the estimation of the community.³ Defamatory statements relating to a plaintiff's profession, trade, or business are defamatory per se, and thus are actionable without proof of actual damage.⁴ In order to recover exemplary or punitive damages, however, the plaintiff must prove that the defendant acted with malice.⁵ A communication

1. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court required the plaintiff in an action against a media defendant to prove that the defamatory statement was made with actual malice, "that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280.

2. The Minnesota common law definition of malice requires the plaintiff to prove that the defendant "made the statement from ill-will or improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff." *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980) (quoting *McKenzie v. William J. Burns Int'l Detective Agency, Inc.*, 149 Minn. 311, 312, 183 N.W. 516, 517 (1921)).

3. RESTATEMENT (SECOND) OF TORTS, §§ 558-59 (1977); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 11, at 739 (4th ed. 1971).

4. *Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn. 1977); W. PROSSER, *supra* note 3, at 754.

5. *McCuskey v. Kuhlmann*, 147 Minn. 460, 461, 179 N.W. 1000, 1000 (1920); *MacInnis v. National Herald Printing Co.*, 140 Minn. 171, 175, 167 N.W. 550, 551 (1918).

is conditionally privileged if it is made upon a proper occasion, from a proper motive, and based upon reasonable or probable cause.⁶ When the defendant establishes the existence of a conditional privilege, the plaintiff must prove that the defendant abused the privilege or acted with malice to receive any kind of damages.⁷

The United States Supreme Court has recognized that compensation of injured individuals is a legitimate state interest, but has imposed limits on state defamation law in order to preserve the constitutional guarantees of freedom of speech and freedom of the press. In *Gertz v. Robert Welch, Inc.*,⁸ a suit brought by a private individual against a publisher, the Court held that the states may define for themselves the appropriate standard of liability in defamation "so long as they do not impose liability without fault."⁹ In addition, the Court held that punitive damages are not recoverable in defamation in the absence of a showing that the statement was made with actual malice as defined in *New York Times*, that is, "with knowledge of its falsity or with reckless disregard of its truth or falsity."¹⁰

There is much debate among courts and commentators about whether the United States Supreme Court intended the rules enunciated in *Gertz* to apply to cases involving media and nonmedia defendants alike, or whether they would apply only to cases involving constitutional issues of freedom of the press.¹¹ Some courts have applied *Gertz* to all defamation ac-

6. *Hebner v. Great N. Ry.*, 78 Minn. 289, 292, 80 N.W. 1128, 1129 (1899).

7. *Id.* See also W. PROSSER, *supra* note 3, at 786-96.

8. 418 U.S. 323 (1974).

9. *Id.* at 347-48. Originally, defamation was a matter of strict liability. See Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777 (1975); Note, *Minnesota Defamation Law and the Constitution: First Amendment Limitations on the Common Law Torts of Libel and Slander*, 3 WM. MITCHELL L. REV. 81, 82 (1977).

10. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350.

11. Justice White in his dissent felt that the *Gertz* holding applied to "each and every defamation action." *Id.* at 370 (White, J., dissenting). Commentators are also divided. See, e.g., Brosnahan, *supra* note 9, at 791 ("The majority opinion did not set out the precise scope of its holding, and this omission leaves the decision subject to different interpretations of the extent of its reach."); Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUT.-CAM. L.J. 519, 573 (1979) ("It is impossible to determine whether the Court intended to apply *Gertz* requirements to all defamation cases."); Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 649 (1975) ("It seems fair, then, to conclude that the *Gertz* opinion formulates doctrine applicable only to defamatory statements made by newspapers and broadcasters, i.e., 'the media.'").

tions,¹² while others have limited the holding to media cases.¹³

Prior to *Stuempges*, the Minnesota Supreme Court had not directly faced this question.¹⁴ On the issue of liability the *Stuempges* court held that *Gertz* did not require *New York Times* actual malice in a nonmedia case. The court reasoned that the *New York Times* standard was fashioned as an exception to the common law rule to permit the media to perform their function of informing the public without undue fear of defamation liability and that the common law rule remained appropriate for nonmedia defendants.¹⁵ This conclusion finds support in the language of the Supreme Court's opinion, which emphasized the balance between protection against media self-censorship and protection of individual reputations.¹⁶ Moreover, the *Gertz* Court explicitly stated that the states may define for themselves the appropriate standard of liability.

On the issue of damages the Minnesota Supreme Court held that punitive damages can be awarded in cases of defamation per se without proof of actual damages to the plaintiff as long as the plaintiff demonstrates the existence of common law malice.¹⁷ The court endorsed awards of punitive damages as a means of protecting employees from vindictive previous employers. In response to the argument that *Gertz* requires a showing of *New York Times* actual malice for punitive damages, the court maintained that the requirement of actual malice in *Gertz* was imposed because of the Supreme Court's worry "that 'jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship.'" ¹⁸ Thus, the court reasoned, because *Stuempges* did not involve media self-censorship, the court was free to permit juries to award punitive damages.¹⁹

The *Stuempges* court was correct in concluding that *Gertz* allows states to impose liability without a showing of *New York Times* actual malice, but it is not clear that the United States

12. See, e.g., *Marchesi v. Francino*, 283 Md. 131, 387 A.2d 1129 (1978); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Wynn v. Cole*, 91 Mich. App. 517, 284 N.W.2d 144 (1979).

13. See, e.g., *Roemer v. Retail Credit Co.*, 44 Cal. App. 3d 926, 932, 119 Cal. Rptr. 82, 85 (1975); *Rowe v. Metz*, 195 Colo. 424, 425, 579 P.2d 83, 84 (1978); *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, 505, 228 N.W.2d 737, 747 (1975).

14. See *Anderson v. Kammeier*, 262 N.W.2d 366, 372 n.5 (Minn. 1977).

15. 297 N.W.2d at 258.

16. See *Gertz v. Robert Welch, Inc.*, 418 U.S. at 340-41.

17. 297 N.W.2d at 259-60.

18. *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

19. *Id.* at 260.

Supreme Court left states similar latitude to award punitive damages. Although the *Gertz* Court conceded that compensation of injured individuals is a legitimate state interest for which states may establish their own standards of liability,²⁰ it also suggested that the state has no substantial interest in the award of punitive damages in defamation actions.²¹ This policy would seem to apply to both media and nonmedia defendants, thus casting doubt upon the *Stuempges* court's refusal to follow *Gertz* as to the standard for the award of punitive damages.²²

20. 418 U.S. at 347-48.

21. *Id.* at 349.

22. The most widely accepted reading of *Gertz* requires a showing of actual malice before punitive damages may be recovered, regardless of whether the defendant is a media institution or a private individual. See Note, *supra* note 9, at 110-11. See also Frakt, *supra* note 11. Some commentators have gone so far as to suggest that *Gertz* signals the abolition of punitive damages in defamation law. See, e.g., Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1252-54 (1976) (suggesting that *Gertz* may presage the general demise of punitive damages in defamation actions). See also Eaton, *The American Law of Defamation through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1439-40 (1975) (suggesting that *Gertz* eliminates punitive damage awards in all but a handful of cases).